PROCEEDINGS

MS. METCALF: We're going to go ahead and get started. My name is Cheryl Metcalf. I'm the policy manager for unemployment insurance in Olympia.

I would like to introduce the staff first before we get started. To my direct left is Susan Harris who is with the policy shop.

And on her left is Juanita Meyers, our rules coordinator. Juanita is the one who has been sending all the reports and information on all of this. And she will be our official information giver today.

And to Juanita's left is Marcie Johnson. And Marcie is

not an employee of employment security, but she is an official court reporter, and she will be making the record for today. Everything that you say will be put into the official record.

And sitting in the audience is Beccie Zolman who is from our tax branch.

So we are hoping between the four of us from our agency that we can answer any questions that you might have of us today.

Now for a little bit of housekeeping. The restrooms are to the left twice around the corner. And in order to get in there, you need to use a code that's on the board.

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There's coffee and pop through this door. And I just found

out that you can't get back in that door once you go out, but it's just a simple circle back around.

I would like to ask everybody to take notice that on the reverse of the agenda are the ground rules for today. We would ask you to take a minute to review those and to honor what's on that statement.

We understand that there are some really strong opinions on this legislation. You are either for it or against it, and only one or two people in between. And it's a lot of change in a very short time because it goes into effect on January 4.

And what I have said in the two previous hearings that we have had is that I worked for the agency for a very long time. I once took a nine-year break and came back and sat down at my desk and did my same job, because the laws change so slowly, and there's been so few significant changes in

the past.

And this is very significant. And it's the first time we have had something like this. We have had a very short time to get the rules in place, get our folks trained, all of our manuals and forms revised. So we are going on a fast track on this.

This is meeting number three on the rules. We have gotten tips from the first two hearings, and we will wait

until we have the transcript from the third one before the final papers go out.

Juanita has taken lots of notes and our assistant commissioner, Annette Copeland, has read both of the transcripts that have come out so far. So what you say

today will be part of the record. It will be considered.

We have started to move a little bit on this. We have had to, just because of the time frame. We obviously don't have anything final yet.

We are on a little more formal format today than usual just because we realize that this is important, and what you have to say is important to us. That's why we have a court reporter making sure that everything said is a part of the record. When you speak -- I will be walking around with a microphone. I'm practicing for my next career. And we would like you to identify yourselves, especially if more people come into the room.

And before we get started, I would like you to introduce yourselves. Tell us who you are representing. And then I'm going to turn it over to Juanita. And when you say your last name, can you spell it, please, for the court

reporter?

MR. TUSLER: Jim Tusler, T-U-S-L-E-R. I am representing the Washington State Labor Counsel, AFL-CIO.

MR. STEVENS: I'm Larry Stevens, S-T-E-V-E-N-S. And I

am here on behalf of the National Electrical Contractors Association and the Mechanical Contractors Association.

MS. STRUS: S-T-R-U-S, and I'm with the State Senate.

MS. METCALF: Thank you. Juanita.

MS. MEYERS: Okay. Let me turn my mic on here.

Okay. The format today is that I'm going to review this legislation by section, focusing on those sections where we have identified issues that may need to be resolved through rule making. I will explain what the law was

previously, what it's changed to, and then outline some of the questions or issues we have, and then ask for your input. And if you would wait until the end of each section, that would be very helpful. And then we will open it up for comments.

The voluntary quits I will split into two or three sections because it's a very long section of the bill, and it's quite a substantive change. And I don't want to wait until we get to the very end.

The first section of the bill we are not going to do rules on. It simply removes the language that said, "This title is to be liberally construed for purposes of reducing the cause of involuntary unemployment and the suffering caused thereby." And that section is the preamble to the whole Employment Security Act, and it doesn't require rule making.

So do we have any questions or anything about that section?

Okay. This next section, again, I'm just going to skip over. It's very clear we don't have to do any rules on that. It just said that the term "wages" doesn't include stock options. And so we will be notifying employers that stock options will no longer be calculated as part of the wages.

The third section is the first one where we had a couple questions. What that statute requires is that to be eligible for unemployment benefits an individual has to be able to work, available for work, and actively seeking work. And it has always required that people seek work pursuant to

their customary trade practices.

The change in the statute says that for claims that are effective on or after January 4 of next year, the an individual who is subject to a labor agreement or dispatch rules must comply with that labor agreement or dispatch rules in their work search.

We have what we call a referral union program where participating unions sign up and register with the department. And rather than making the work search that other claimants do where they make three job search contacts a week, what we do is require that they remain in good standing with their union and comply with their union's

dispatch rules. So essentially, this puts that into statute.

Our original question was, Does this section go beyond just the referral unions? Because the language doesn't specifically reference referral union members or union members. It simply says an individual subject to a labor agreement or dispatch rules. Now, certainly dispatch rules would almost certainly be union members, but we thought there could be other labor agreements.

In the previous two meetings, pretty much everybody said they meant union members not others. But we would like your input on if you have any suggestions or if you disagree with that or agree. Any input you have on that requirement to Section 3? Any comments? No?

MR. TUSLER: Could I take you back one section and ask for clarification?

MS. MEYERS: Sure.

MR. TUSLER: You started out with you were removing the language "liberally construed." Is that part of the legislation, and what is the reasoning for that?

MS. MEYERS: I can't speak to what the reasoning was. I can tell you it is part of the bill. It removes the "liberally construed" language.

However, because that section of the bill that was amended is simply the preamble, it's not a substantive

portion of law. So in reality it's not going to have a significant impact on our decision-making process.

Generally, now we look at the preponderance of the evidence. We look at who was the moving party in a

separation, and we will continue to do that.

The words "liberally construed" are not in any part of our rules or court cases, so the impact on that particular section is going to be minimal.

MR. TUSLER: Thank you.

(Whereupon, the proceedings were joined by additional stakeholders.)

MS. MEYERS: I will give people a couple minutes to get settled before I go on.

MS. METCALF: We are going to ask the two of you that came to identify yourselves for the record.

Mr. Knowles, you haven't been with us previously. So this time we have a court reporter here, and we are making an official record of everything that's being said here today.

MR. RAFFAELL: I'm Norm Raffaell. I'm with Weyerhaeuser Company; also with the Association of

Washington Business Unemployment Committee.

MS. MEYERS: Norm, could you spell your last name for the record?

MR. RAFFAELL: R-A-F-F-A-E-L-L.

MR. KNOWLES: My name is William B. Knowles, K-N-O-W-L-E-S. I'm an attorney in Seattle, Washington.

MS. MYERS: Okay. We are going to go on with Section 4 which is a very significant change to the statute that describes what is good cause for voluntarily leaving work. And as I said, I'm going to go through a few of the sections and then stop and take your input in groups of sections.

The law said that beginning with claims that are

effective January 4, 2004 --

MR. KNOWLES: Before we go further, is that section further defined by the department, what that means?

MS. MEYERS: What does what mean? I'm sorry.

MR. KNOWLES: The class of claims to which this subsection as newly amended will apply.

MS. MEYERS: Yes. It will apply to all unemployment claims that have an effective date on or after January 4.

MR. KNOWLES: Meaning the benefit year?

MS. METCALF: The benefit year begins on January 5 or later.

MR. KNOWLES: So any claims filed prior to that time will not be subject to any of these new provisions that we are about to discuss throughout the pendency of their benefit year; is that correct?

MS. METCALF: That is correct. We will be running, approximately for a year, two systems where people whose

claims were filed up until January 3 will be under the old law. Claims filed January 4 or later will be under the new law. So we will be adjudicating two different statutes simultaneously depending on the claimant's effective date.

MR. KNOWLES: Actually, that will continue for a longer period than one year; isn't that correct? Because claims that are filed after the new effective date of the wage averaging provisions will also require that the department run parallel adjudication systems; isn't that correct?

When you change the way that the benefits are calculated, you are still going to have two different groups of claimants. Even two years from now you will still have

two different groups of claimants, correct?

MS. MEYERS: I don't know why we would.

MR. KNOWLES: Because you changed the way that the benefits are calculated --

MS. MEYERS: Correct.

MR. KNOWLES: -- two times. First, it's based on an averaging of three weeks, and then it's based on an average of four weeks, correct?

MS. MEYERS: Quarters. Yes.

MR. KNOWLES: So there are two time periods in which the department is going to have to run parallel programs, correct? Two years?

MS. MEYERS: Right. The adjudication will be about a

year. The difference is between the good cause for leaving work and the misconduct changes.

But you are correct. The way the benefits will be calculated is going to be changed next year and then the year after that. So for two years, yes, we will be changing the manner in which an individual's weekly benefit amount will be changed. Then, of course, many of the tax changes come into effect for 2005.

Okay. Let me go on. And what I would like to do is just on each section I will go through the sections, what the law said, what we believe it says now, what questions we have, and then open it up for comments.

The law provides that an individual is disqualified for leaving work voluntarily unless they have good cause for doing so.

The current statute that is in place now enumerates a

number of reasons that an individual has good cause for leaving work. The good cause factors that are currently in the law are fairly broad and allow quite a bit of discretion for the department to evaluate individual situations.

For example, an individual could qualify for benefits if there is a substantial deterioration in the working conditions from those that are present at the time of hire. There are various other types of reasons that are, you know -- the department would apply that individual set of

facts to determine whether there was a substantial deterioration.

The law as revised now lists specifically ten reasons why an individual has good cause for leaving work. And it

takes out the general language, such as "substantial deterioration," and replaces it with specific factors that provide good cause for an individual to leave work. And I'm going to go through those reasons. And, as I said, we will go over a couple, and then I will stop for comments and then move on.

The individual is still permitted to leave work or has good cause to leave work in order to accept a bona fide offer of other work. That is not changed from the existing statute.

I do want to stop. I forgot to mention that one thing that is in the current law is that an individual who leaves work for marital or domestic reasons currently can requalify for benefits either by waiting seven weeks and earning seven times their weekly benefit amount, or by reporting in person to their work source office for ten weeks and certifying

each week that they are able to work, available for work, and actively seeking work.

That in-person reporting requirement -- provision is gone. In the new statute beginning with claims effective January 4, anybody who is denied benefits because they left

work for personal, marital, domestic reasons will now need to requalify in the same manner as other individuals denied benefits for this reason; that is, they wait seven weeks and earn seven times their weekly benefit amount. So that is something that is eliminated from this new statute.

As I mentioned, the statute is unchanged about an individual who is leaving work to accept a bona fide offer of other work.

The second section allows benefits to individuals who leave because of illness or disability -- their own illness or disability or the death, illness, or disability of a claimant's immediate family. That's in current statute, but the amended statute, this bill, adds some qualifying language to that.

First, it requires that an individual pursue all reasonable alternatives to preserve their job by requesting a leave of absence, by notifying their employer for the reason of the absence, and by promptly requesting reemployment when they are again able to work.

They don't have to do those acts if they would be futile. Such as, they know their employer doesn't offer leaves of absence, or something of that nature. And that includes cases where the futility is the result of a labor management agreement or dispatch system.

25 But it also requires that the individual must terminate

his or her employment and be no longer eligible to be reinstated to that same position or a comparable or similar position.

(Whereupon, the proceedings were joined by another stakeholder.)

We aren't entirely certain how we are going to implement this. We have asked for guidance from the Department of Justice as to what ramifications this has for the agency or the State.

Because it appears to say that an individual who is temporarily disabled or ill but could do other work -- where

today we would pay them unemployment benefits if they can't do their current job but they could do other jobs. Even if the employer was required under the ADA or other law, maternity regulations, or whatever, to hold their job for them, we would pay them benefits. This seems to require that the individual surrender those guarantees under federal or state law in order to draw unemployment benefits. Again, we are looking at this to see what kind of ramifications this has for the department.

And I will go ahead and take questions now. I know there are some comments for this one.

MS. METCALF: Before we have questions, could I have Gina introduce herself for the record?

MS. MEYERS: Sure.

MS. BACIGALUPO: Gina Bacigalupo; Director of Claims Management for NECA. The last name is B-A-C-I-G-A-L-U-P-O.

MR. KNOWLES: What specific statutory language does the department believe forms the basis for the conclusion that the person has to be separated from employment in order to qualify under the new statute?

MS. MEYERS: Okay. It would be in the new Section 4 on page 7 at the top of the page in the parenthesis (b), "The claimant terminated his or her employment status and is not entitled to be reinstated to the same position or a comparable or similar position." And that's got a conjunctive "and" with the previous section.

MR. KNOWLES: The question I would have is in situations where federal law would mandate that a person who, for example, is gone for twelve weeks of FMLA leave be

reinstated to a like or similar position, it doesn't seem to me that the department is in a position to -- if that person is forced at that point to leave employment, that is, they terminate his employment situation, if for some reason he is eligible or not able -- if he is able to return to work, of course, he or she can go back to work.

But if they are not able to return to work for medical reasons, is the department going to be putting those people in the position of saying, "Now, you have to quit your job

in order to be eligible for unemployment benefits at this point"?

MS. MEYERS: And that, quite frankly, is what we are

tying to resolve.

This particular section is one where we still have a number of questions as to how we are going to implement it. We are consulting with our attorneys. As I said, we have talked to the Department of Justice to see exactly how or whether -- how we should implement it. Or if it's a legal problem, whether we need to report that to the governor's office, or whoever, just to let them know.

MR. KNOWLES: It certainly creates a problem with conformity. Because the Family Medical Leave Act provides certain finality to decisions that are made by unemployment compensation systems for the purpose of adjudication of benefit eligibility.

Notwithstanding the department's own rule that says that no conclusion or determination of the department can be used as evidence in some other proceedings, the Family Medical Leave Act, nevertheless, creates a presumption that

certain decisions made by unemployment insurance systems in each state have some legal -- they are accredited and given some legal standard.

So it's creating two problems for the State of Washington: One, a set of laws that are not subject to the

evidentiary rule or exclusion that's contained in the statute, and, in this situation, laws that would be subject to the federal rule on this. So you have a federal conformity problem with this particular provision of the statute.

MS. MEYERS: Thank you.

MS. BACIGALUPO: First, I have a question. How does

the department currently handle an individual on family leave where they are returning to work at the end of their disability?

MS. MEYERS: We adjudicate two things: First off, we look to see where they had good cause for leaving. We would look now to say, "Did your illness or disability necessitate you leaving work for family medical leave or the condition?" So you can leave now for illness, disability, or death of immediate family members. So you have got that question. So we will probably allow them on the separation.

But we also then look at whether they are available for work. Many or most people on FMLA aren't available for work. Because they have -- you know, if you are quitting or leaving your current job to take care of a family member, then usually you aren't available for other types of work.

Where it more commonly comes up, is an individual with protection under either the state maternity regulations or

the Americans with Disabilities Act, individuals who have a

disability or an illness that's temporary in nature. They can't do their current job for whatever reason, and their employer has to hold their job for them. But there is other work they can do, and they are willing to seek that other work. If that is the case, and there is work available for them in the labor market area, then we would pay them unemployment benefits, even though their original employer has to hold their job for them. If that person can work, is seeking work, and there is work available for people with their limitations, we will pay them.

MS. BACIGALUPO: Is it very often that people who have

requested a leave of absence and returned are actually looking for other work during their leave?

MS. MEYERS: It doesn't happen very often, maybe 75 to 100 cases per year. Most people, for example, a pregnancy, by the time they are leaving work it's because childbirth is imminent, so they are taking, specifically, maternity leave.

But there are situations where individuals can work and want to work. They simply can't do their present job for either pregnancy or a pregnancy with a related disability, excuse me, or some other type of disability. They have a bad back that's going to be corrected through surgery. They can't do heavy lifting, but there are many other things that they can and are willing to do. Currently we will pay them unemployment benefits while they look for work.

What this section appears to require is they have to quit their job to get unemployment benefits.

MR. KNOWLES: So the department understands the issue of federal conformity that this particular provision applies to, I will also point out to the department that it violates the terms of the conditions of the class action matter that the department settled with an agreement and actually a series of new rule making much broader than the agreement requires.

But the specific problem with federal conformity is as it applies to 26 USC 3304's provision with respect to the treatment of persons who are pregnant in terms of eligibility for benefits. And this is exactly -- if the department goes forward with implementing the new law as you are currently discussing, it will have the effect both of

violating the prospective injunction that the State agreed to in Looser and Gachen (phonetic) vs. Employment Security Department.

And also it raises the same problem of federal conformity that was raised in that previous litigation, which would essentially make the State of Washington's unemployment insurance system a nonconforming system under the Department of Labor's standards, whatever rule they have reached on that up to this point.

That's one if, as that applies, the effect of the

statute is to violate the federal conformity requirements, you will be back to the situation of having a Lopez notice issued against the State of Washington for nonconforming

use, which will have the impact of having all of these employers lose the deductibility aspect of their unemployment insurance contributions which are currently a deduction from the employer's ordinary and necessary business expenses under the federal income tax law.

Every employer in the state of Washington will lose the tax deductibility of that portion of taxes they pay to the State of Washington for unemployment insurance purposes if the State goes forward with implementing this law as drafted or as you have just expressed, because of the problem that it creates in the situation of pregnancy disqualifications.

Specifically, two industry groups that you have not identified are groups that are exempt by reason of contract or collective bargaining agreement from using video display terminals, as well as maybe perhaps like some of the more enlightened employers in the state's own safety rules. But

I haven't seen any rules that rise to that level with respect to prenatal cathode ray protection, at least no rules imposed by employers voluntarily on that subject.

But some collective bargaining agreements do provide that employees cannot be compelled during the neonatal period to be exposed to cathode rays. And so those people

are precluded from their ordinary, necessary work. And the usual situation is they go out on a leave of absence, because the employer says, "Gosh, we don't have any other work for them."

Now, the question is if that worker who otherwise would be eligible for unemployment benefits now is forced to terminate their employment by virtue of the fact that they

are pregnant and out on a leave, there is a very serious problem for the department.

But generally, flight attendants have the same issue with respect to periods of pregnancy where they are precluded by their employer's rules from being present in the workplace during certain trimesters of pregnancy, not because they are unable to work, but because the employer has made a decision. And I think it's reflected in the voluntary agreement under the FAA's rules since there are no OSHA requirements. Flight attendants are precluded by the employer mandatorily from being employed after certain periods and are put out on a pregnancy leave of absence.

And it is the circumstance of both of these two groups of workers that has led to the prior litigation with the department on this subject of pregnancy disqualifications. And in both circumstances, the state courts have ruled that

the State of Washington cannot conform to federal law by imposing more stringent requirements on pregnant claimants

than you do on other groups or classes of claimants.

So the department is going to have a real problem if you are planning on implementing this rule in the way that you are currently speaking about it. I don't believe that the statute needs to be read in that manner.

MS. MEYERS: Okay. How do you believe the statute can be read?

MR. KNOWLES: The prior subjunctive of these alternatives need not be pursued. It seems to me logically it also is a conditional clause in the current statute. And so if the situation is that, for example, because of a

collective bargaining agreement in the circumstances I just described, the department finds that the person is -- that the objective of requiring them to terminate their employment is futile, the department need not impose that requirement in the conjunctive. And subsection (b), therefore, is modified by the preceding sentence, a common rule of legislative construction.

MS. MEYERS: Thank you. And I just want to say, again, that we are aware of these issues you have raised. We are pursuing legal advice as to what steps the department should take in implementing this section or requesting other legislation, if possible.

MR. TUSLER: Could you just give me a general understanding? If the department perceives conflict between

a legislative bill signing, public law, and another statute, what is your procedure? What -- take it away from this one. If there is a number of those, what happens?

MS. MEYERS: The department doesn't generally take positions on legislation unless it presents a risk to the trust fund or it presents a potential conformity issue. So if we, in fact, find that this legislation presents a conformity issue, then we would probably -- I mean, I can't speak for the department. But we would probably submit agency-requested legislation to change it if there's a conformity issue.

MR. TUSLER: Let me clarify. We have legislation. I mean, the bill is signed.

MS. MEYERS: Correct.

MR. TUSLER: If the department perceives it is in

violation of existing law before you promulgate rules, what procedures does the department take?

MS. MEYERS: If we determine that this legislation -- if we are notified that it presents a conformity issue, we will request legislation to amend it. But until that legislation is passed, we will need to implement the bill as it is written and as our attorneys advise us it should be interpreted.

So it's unlikely that -- well, there's not going to be any legislation on January 4. The session doesn't come into

effect for a couple weeks. So we will implement this bill, even if it is a conformity problem. And I'm not saying

necessarily that it is. I know Mr. Knowles clearly feels it is, but we haven't gotten back that answer yet.

So we will implement it January 4 whether it's a conformity problem or not. But if it is a conformity problem, I believe we will ask for corrective legislation to say, "Here's a problem." But it's certainly up to the legislature whether or not to pass it.

We have had cases in the past -- you probably remember the school employee -- where legislation was passed that was out of conformity, and we operated under that legislation for a couple of years before it was amended by the legislature.

MR. RAFFAELL: I'm just looking at the new Section 36, page 49. And it's describing -- it's the old catchall that "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the State or the eligibility

of employers in this state for federal employment tax credits, the conflicting part of this act is inoperative solely to the extent of the conflict..."

So I guess what I'm looking at -- my impression is that -- or at least a question that I don't see that's getting answered is, How do you determine whether it's in conflict?

Is it based on a statement from the Department of Labor that throws a little glove down and says, "This is out of conflict"?

Or is it after you have gone through the hearing process with them to determine and the determination is it's out of conflict?

And then another question would be, do you want to sue their determination?

And so the direction you are going may not be the only direction that you have. I guess, what do you normally do or have you done in cases like that?

MS. MEYERS: Again, it came up during the case of the school employees. What happens first is we ask for any potential conformity issues with the legislation. The Department of Labor -- their policy unit essentially tells us, "Yes, we believe this is a conformity problem, and here is why."

And then we will get a letter from the Assistant Secretary of the Department of Labor saying, "Here's the section of the law. Here's the section of your law and the section of federal law that it violates. We are notifying you that it's a conformity problem. We are requesting that you ask for corrective legislation to fix this." But the

actual determination doesn't happen until the actual hearing takes place.

When we got the notification of the school employees, we disagreed that it was a conformity problem, so there was quite a bit of correspondence and meetings going back and forth. So we actually received what the Department of Labor calls the gauntlet letter. And they basically said, "You are out of conformity. We are scheduling you for a hearing."

And at that point it's serious. Because if that hearing goes against the department, that's when the employers lose the tax credits and the agency loses its

administrative funding. So we don't like to get to the hearing point, if possible. We like to resolve things before we get to the hearing.

Now, certainly if there's a hearing decision that's adverse to the State, I believe there's an appeal process for the State. But I believe in the pendency of that, the tax credits are gone, so we try to resolve it. And it takes a year or two to get to that point sometimes, depending on how egregious the violation is.

For example, I know during session there was some discussion about adding a section in the bill about people who drew benefits for two or three years in the same season couldn't get it for the next period of years. The Department of Labor said not only was that a conformity issue, but they would move on it immediately.

MS. BACIGALUPO: On the section on voluntarily leaving for a leave of absence due to illness, I don't understand where the statute is saying that that person cannot collect benefits if they are on a leave of absence and able to do other work. Where is it specifying that?

MS. MEYERS: Again, on the top of page 7, it follows on from the previous section where it says that separation of illness, disability, et cetera, if the claimant pursued all reasonable alternatives and the claimant terminated his or her employment status and is not entitled to be reinstated to the same position or a comparable or similar position. So essentially a leave of absence gives you those return rights.

MS. BACIGALUPO: Okay. Thank you.

MR. KNOWLES: I will hold my comment if you are going to move on and do the next section.

MS. Meyers: Okay. I will do the next couple sections, and then I will stop for comments again. I will actually probably do the next three sections.

MR. KNOWLES: Perhaps it might be useful to go through all ten.

MS. MEYERS: I am going to go through all ten. I'm just breaking it into subsections. Or would you rather I wait until the very end and go through all of them? You can comment on them all at once. I can do that if nobody cares.

MR. TUSLER: I would like you to do them one at a time if you can.

MS. MEYERS: One at a time. Okay.

The next section provides that an individual has good cause for leaving work under a -- basically what we call a quit to follow their spouse. Under current statute, an individual can get benefits if they are following a spouse who has been mandatorily transferred by his or her employer.

The amendment now says that benefits are only available to individuals who leave work to relocate for a spouse's employment which is changed due to a mandatory military transfer. So first it limits it to military transfers only. So other people now transferred by their employer, their spouses no longer have good cause to quit their job. That is now considered a personal reason for leaving work.

The couple of qualifiers on that are, one, they have to have moved outside their existing labor market area and they have to have moved somewhere else in Washington or to

another state that allows good cause for the same reasons.

We have surveyed all the other states to find out which other states allow benefits under this situation, and there are only 15 of the other states.

So if an individual is transferred to, I don't know, Arizona -- actually, no. Arizona allows. Say they are transferred to Arkansas and their spouse goes with them.

That state does not allow good cause, so that spouse would be denied unemployment benefits. If, however, they are transferred to California, that state does allow good cause for military transfers. So we would allow benefits if they were transferred to California.

MR. KNOWLES: I see the department has a list of

states. Can that list be made available?

MS. MEYERS: Certainly.

MR. KNOWLES: I would certainly like to see a copy of it.

I believe this provision raises a problem already addressed in prior state law cases that it constitutes an equal protection violation. And so I think particularly in the situation where we are dealing with involuntary military transfers, the State will under our own state law not be able to sustain this law as a matter of violation of equal protection.

MR. TUSLER: A second point of clarification, Juanita. Why -- if the claimant is drawing on Washington state employer-supplied funds and they move to another state, it has always been my experience that they are drawing on an interstate claim and Washington state law is applicable.

MR. KNOWLES: That is correct.
MS. MEYERS: That is correct.
MR. TUSLER: Then why are we bringing up -- even a

military move would be applicable to the laws in this state where they are relocating to.
MR. KNOWLES: It is a statutory problem, not a rule-making problem.
MS. MEYERS: I want to clarify. The department takes no position on the legislation itself until or unless it impacts the trust fund. I can't speak to why the legislature put this amendment in. I certainly can't speak for the legislature. I can't speak for the --
MR. KNOWLES: AWB. Ask them.

MS. MEYERS: I can't speak for any other people. The fact is that it's there. As Mr. Knowles pointed out, this is a statutory problem.

MR. TUSLER: Could you read me the section in the bill that would say other state's law is applicable? I guess that's what I'm struggling with.

MS. MEYERS: Okay. On page 7, the second full paragraph down where it's got the three little "iiis."

MR. KNOWLES: Lines 10 and 11.

MS. MEYERS: Oh, okay. You're on a different page.

MR. KNOWLES: 7 lines 10 and 11.

MR. TUSLER: Thank you.

MS. MEYERS: The individual has good cause if they "Left work to relocate for the spouse's employment that, due to a military transfer: Is outside the existing labor

market area; and is in Washington or another state that, pursuant to statute, does not consider such an individual to have left work voluntarily without good cause..." I mean, that's stated in the negative, but essentially the other way you could say that is, considers an individual to have left work with good cause.

So this is the first time we are paying benefits based on another state's law. You are correct.

Any other comments, questions before I go on to the next section?

MR. KNOWLES: Just a comment for the State very quickly.

The precedential state law involving the equal protection issues involves the equal protection, quote,

"restriction on the right to travel," that was existing under prior state law with respect to the question of workers' compensation benefits.

And that case held that the requirement that existed in the law constituted an equal protection problem because it denied people or discriminated against people based on the fact that they were forced by virtue of their employment or their spouse's employment to move.

MS. MEYERS: Thank you. I'm going to go ahead and move on to the next section.

Subsection 4. The next reason is not a change. That

is exactly what is the same in the current statute. "The

separation was necessary to protect the claimant or claimant's immediate family members from domestic violence... or stalking." That was passed last year as a good-cause reason for leaving work. It remains unchanged.

Subsection (v). Sections (v) through (x) are essentially the reasons that replace what we had before as substantial deterioration of working conditions. These sections now give specific reasons or criteria that have to be met.

Subsection (v) says, "The individual's usual compensation was reduced by 25 percent or more." Current general standard -- and this is only through policy court cases it's on -- we look at somebody if their hourly wages were cut 10 to 12 percent, we may determine that that's a substantial deterioration of working conditions. We look at the entire package and how their work changed.

This puts a concrete figure on what has to be reduced.

But the questions we had -- and I'm sorry I didn't state it earlier. I'm kind of following this issues for a potential rule-making piece. What is included in "usual compensation"? The statute now defines "remuneration." We now by rule define "wages." We don't have a specific definition, per se, of "compensation." In this packet where it says "Section 4" handwritten in the corner, there's some

various pieces in there.

MR. KNOWLES: Is this the current statute or current rules?

MS. MEYERS: These are the current rules that I included just for your information.

On the third page there's an excerpt from RCW 50.04.320 which defines "remuneration." Which is meaning all compensation paid for personal services and that includes commissions, bonuses, and the cash value of all compensation paid in mediums other than cash.

So when we are looking at an individual's usual compensation to see if they have experienced a 25 percent reduction, our initial question is, Do we look at wages only, or do we also consider other forms of remuneration that they receive? You know, people are given things like company cars, lunches, meals sometimes come with their job, health benefits, retirement benefits, stock options -- a whole variety of different things, sometimes housing, et cetera.

So do we look at the entire package to decide whether the person has experienced a 25 percent reduction? For example, we know now a lot of times because of the rising

healthcare costs employers are either eliminating healthcare benefits or dramatically increasing the individual's copay. So even though their employer's share of the costs of the

medical benefits has been reduced, can we look at that as part of the overall reduction in their compensation, or are we limited to wages only? So that was one of the pieces where we would like to get some input on.

And the other piece is if it's given in a form other than cash, like, for example, use of a company car, how do we say that is a 25 percent reduction or it's not 25 percent? It's hard to quantify things like that that are paid to an individual as part of their compensation package.

MR. KNOWLES: It seems to me that the department, first of all, absolutely has to look at the value of healthcare benefits. I would point to the recent decision Cockel (phonetic) vs. Department of Labor & Industries by the state supreme court which held that certain types of payments to employees are considered part of their regular or usual or ordinary compensation and, therefore, should be included in the definition of wages, which is used for the purpose of determining the rate at which time-loss benefits should be paid to injured workers in the state of Washington.

So it seems to me that by virtue of RCW 50.04.320, additionally, the department needs to prescribe some rules in order to determine what the reasonable value of payments made in some medium other than cash are.

It seems to me that when there is a dispute arising under this particular section that we have gone now from a

generalized definition of good cause to a specified definition of good cause as designated by the legislature, that there needs at that point to be a mandatory disclosure on the part of the employer at the time that the employee is asserting, saying, "Well, I quit because my compensation was reduced." We need a regulation by which the department defines the material or information that an employer at that point must be compelled to provide to the department.

Of course, the department has the ability to go in and audit an employer's books at any time they want to determine whether or not it's paying the correct amount of money to an employee or paying taxes on the correct amount of money for an employee's earnings or wages.

But it seems at this point we should have a list of items that the department -- if an employee comes in and says, "I voluntarily quit because they reduced my compensation by 25 percent -- my usual compensation by 25 percent." It seems to me what we need is a regulation that specifically says, "Okay, when that claim is raised by the claimant, the employer shall produce the following items: 1099 forms, W-2 forms for the employees, a copy of their income tax returns to see what ordinary and necessary business expenses they are claiming are a part of an employee compensation.

And the presumption should work like this -- and also

payroll records for the employees, copies of the medical

plan payment, the plan, and any deductions that the employer is making from the payroll check, any increases in compensation -- or deductions, for example, due to things like L & I rates, et cetera, if an employer's L & I rates jump or unemployment rates jump precipitately so the employer is no longer paying people what they were or the employer's contribution to L & I is an additional burden on the employee.

Then it seems to me that if the employer doesn't produce -- and I think it should be a standardized list of things so the department just as a matter of course issues a form letter to the employer and says, "An issue has arisen about this. The employee has claimed their wages were reduced for this reason. Please produce the following list of items." And then the department makes the determination as to what the actual reduction is based on some kind of a

formula.

To do it any other way is going to put a tremendous burden on your adjudicating function, or it's going to put a tremendous burden on the claimant. Because I can tell you, based on my experience doing these cases for twenty-some-odd years, that it's very hard for unrepresented claimants to figure out how to come up with all the things they need from their employer and convince an administrative judge to

produce it, et cetera, et cetera. So the correct place to make this determination is at the department adjudication level.

So the department should just have a form letter where they tell the employer, "Fill out this form. Provide us

with back-up documentation. We will make the decision about whether or not there was a 25 percent reduction, pursuant to a rule." We will promulgate a rule, which we should probably have other hearings for once that rule is proposed. But that seems to me to be the way to solve this problem.

MS. MEYERS: Any other comments?

MS. BACIGALUPO: I just wanted to comment that in this situation I think requiring that level of documentary evidence to make the decision is pretty excessive. In general, the department has taken statements by the claimant, statements by the employer to make their decision.

I don't think an employer has any reason to not provide the information that is being asked for any more than that currently have reason not to. And when a huge amount of documentary evidence is required, that generally comes up in the hearing.

But for every employer for every employee with this claim to have to print off and require this amount of paperwork and get it to the department and then expect the department to read it all and understand it and adjudicate

it based on their own reading and understanding is, I think, far more cumbersome to the system than taking the statements and getting the dollar figures and going from there.

MR. RAFFAELL: I somewhat agree with you on what you were saying, Mr. Knowles. But the issue here is who is the moving party? In this case the claimant is the moving party. If it's the employer, the employer has the burden. If it's the claimant, the claimant has the burden.

And I think that many times people will quit, and they

will not give any consideration at all to this 25 percent rule. So it will go to the merits of, "Why did you quit?" They may have to provide to the department specifically what was cut back. And then you are the fact finder and put it together and issue a decision.

I would agree that it would create all sorts of paperwork for employers and costs for you to even process that type of situation.

MR. KNOWLES: Well, of course, in the past the determination of what constitutes good cause was always sort of carefully considered under a rubric of a mixture of: What were the general social conditions at the time? What was the general level of unemployment? In times of high unemployment, the rules seemed to be that generally relatively small amounts of reduction constituted good cause.

We have sort of had it for the last -- our state appellate courts and our state supreme courts have said it is sort of a flexible measure that we used under the general consideration of good cause. For the first time now, a specific percentage reduction in compensation has been specified by the legislature.

And the gentleman from AWB in his off-the-record comment said, well, the reason we don't have the liberal construction anymore is that the statute should be read and interpreted exactly as it's written.

So this is one of those situations where the business community has requested that this be the basis for the determination. And they have influenced the legislature to

ramrod a new statute down our throats. And so we are now in the situation where we are figuring out how the rules are going to be made that implement that.

I may feel sorry for the employers that they have created a burden for themselves; however, I see the situation to be very black and white in the new statute. The department is charged by the legislature with making a determination whether the individual's usual compensation was reduced by 25 percent or more. This is a situation where there needs to be objective standards.

So although it may create a paperwork burden for employers, it's no more onerous than doing a wage-payment-

by-history evaluation, an audit, shall we say, that the department does all the time. And there's a simple form that goes out to the employer which they are altogether too eager to fill out and return to the department, of course, because there's a financial benefit potentially to them if they can prove that their former employee somehow provided misinformation.

But it seems to me that this is not a question of a burden of proof, but a new statutory construction. In the past where the new statutory construction was open, the department permitted the people who were coming to the table to sort of present whatever evidence they wanted to and made the decision. The legislature has taken that out of the department's hands by enacting a specific number, a 25 percent number.

So it seems to me that this is something for which there needs to be some mandatory employer reporting. But it

seems to me it only arises in situations where that employee makes that assertion in their claim. "Why did you quit work?"

"They reduced my pay by 25 percent."

The questionnaire goes to the employer. The department makes an objective determination. The employee can file and appeal if they don't agree, or the employer can file an appeal if they don't agree. That's why the new statute is

specific. So we are no longer dealing with a statute that is to be interpreted. We are talking about a statute that is bound by very specific guidelines that were created by the legislature.

And the business community had better not be telling us that it is a burden because they are the one that's created it in the first place.

MS. MEYERS: Okay. Thank you. Go ahead and then we are going to have to move on.

MR. TUSLER: I just want to make it clear that the legislation clearly says "compensation." That should be construed as waged and the other things that we all work for. I take some exception to the handout that says 25 percent decrease in wages on your topical pages. That the legislation was very clear that it was a 25 percent decrease in compensation. It should be all encompassing.

MR. KNOWLES: And you have raised a question in the handout about the period of time that this should be considered. And it seems to me that the period of time that needs to be the measuring factor is the benefit year. If the claimant's usual compensation is reduced more than 25

percent over the course of the benefit year that they are in whether they have opened the claim or not -- let's say, the year proceeding the time that they actually opened the claim, the base period, if they get a 25 percent decrease

during that period, that seems to be the measuring period. That is to say, the one-year period immediately prior to the time that they open the claim for benefits, since that's the base period upon which their compensation will be measured in terms of future benefits as well.

MS. MEYERS: Thank you.

I'm going to move on to the next one, which is actually very similar. So this one says that an individual has good

cause for leaving work if their usual hours were reduced by 25 percent or more.

Again, we need to make a decision as to how we are going to look at what constitutes an individual's usual hours. Are we talking about their daily hours of work? their weekly? monthly? annual? whatever.

Do we look at what the individual's hiring agreement stated would be their usual hours, or do we look at what is standard for the occupation?

I mean, an employer may have had somebody working 60 hours a week because it's, you know, high contracts. And they hire more people, so they cut their hours to 40. But the person says, "Wait, I took that job because it was 60 hours a week, and I want the extra pay." But 40 is all that individual is going to get in most cases in the other occupations.

So is that good cause? Do we look at the individual's

agreement, or do we look at the standard for the occupation in that labor market area?

Just a second. Let me finish the section, and then we will take comments.

If the employer says, "I have to cut my day shift by 50 percent, but I have swing shift work available for you." If they are offering replacement hours, is that still considered a reduction? We think it probably is, but we would like to certainly hear your thoughts on that.

And, again, how long do the hours need to be reduced to qualify. There are sometimes employers in today's economy that for a period of time they may say, "Okay, for the next

-- we are cutting everybody's hours for the next month, and then you will be able up to full time." So if it's seen as a temporary reduction is that sufficient, or do we go back to what we have established through existing case law.

What we use is a reasonably prudent person standard. Would a reasonable prudent person quit a job because of a temporary reduction in hours?

So I will open it up here. So what type of reduction needs to be in place before the person has met this criteria?

MR. KNOWLES: It seems to me that the pay period is perhaps the easiest way to make this determination, unless the employer has requested that the employee be available

for them as a, quote, "standby" employee for some reason and the employee qualified for benefits under the standby rule.

Otherwise, it would seem to me if an employer says, "Guess what, folks. We are going to cut your hours down to 20 now, and you are going to have to stand by for two months" -- it would appear to me that, you know, that would certainly qualify. It's a 50 percent reduction.

But any rule that says that an employee who's losing more than 25 percent of their wages can't go out and say -- "Well, I'm going to go look for other work. And I'm going to start using unemployment benefits for that purpose because I'm not able to sustain myself on the amount of money that you are paying me now." That should establish good cause.

So I would say the pay period is the time period that ought to be the measuring value. And that unless the

individual qualifies as a standby worker, they should be eligible for benefits if the employer reduces their wages by 25 percent within the pay period.

MS. MEYERS: Okay.

MS. BACIGALUPO: Before I comment, I just wanted clarification. Were you referring to in one pay period, or per pay period for a permanent change when you were speaking of reduction in a pay period?

MR. KNOWLES: If the employer reduces an employee's

pay -- let's say he has been working full time, and now the next week the employer comes along and says, "Well, gosh, I'm only going to give you five hours this week, but maybe I will get you a job next week." Electrical contractors like

to do that. "Just stand by. We will put you to work." And if the employee stands by, he should be eligible to get unemployment.

MS. BACIGALUPO: But I'm asking -- well, my comment is, when we talked about the 25 percent reduction in compensation, the idea was to look at the base year. And then when we are looking at hours we are saying in a week. So all of a sudden the picture goes down to a seven-day period to decide if this person has lost 25 percent of their hours, and we are going to look at a base year for wages. It seems like these two criteria should be very, very closely matched in how to make this determination. They are pretty much tied hand in hand.

MS. MEYERS: Do we want to take a break? Excuse me, Norm.

MR. RAFFAELL: The problem with the base year is they

could have two or three different base year employers or more. So you are really talking about that employer that they left work for. And the word "usual hours" and "usual compensation" -- the word "usual," that's there. And that's, I think, what you need to determine is what's going

to be your definition of "usual" in your rule making.

And it's not an easy thing. And I appreciate you having to work with it. But I think that's where the key is. It has to be the usual hours with that employer that they left.

MS. MEYERS: Do we want to take a quick break or move on to finish voluntary quits?

MR. KNOWLES: I think we should move on.

MS. MEYERS: Okay.

MR. KNOWLES: The statute specifically says the individual's usual hours were reduced. The statute doesn't say the work available from the employer is not the same as the usual hours in the industry. The statute as written by the legislature says the individual's usual hours were reduced by 25 percent or more. If the employers don't like a pay period to be the measuring unit, then the pay periods can be months or weeks, two weeks. An individual has good cause to quit when an employer ceases to provide them with the same level of employment under this statutory provision and reduces it by 25 percent. And that's usually reflected in the standard pay period of the employer.

Any other rule, as has been pointed out by the AWB representative, an individual may have any number of base year employers with any number of work schedules and teams.

25 But it is the specific job that they are leaving that the

1 legislature has directed that we need to look at. And when
2 that employer reduces the individual's usual hours by 25
3 percent or more, that individual has good cause to quit.
4 And I don't see how that can be determined any way other
5 than on the pay period.
6 MS. MEYERS: Thank you.
7 I'm going to move on to the next one, then, which is
8 distance to work. That's subsection (vii).
9 Currently, an individual may have good cause for
10 leaving work if the commute to the job site is outside the
11 normal commute distance for their labor market and
12 occupation. And that is true even if they knew the commute

distance at the time they took the job.

So, for example, I live in Olympia, and for whatever reason I couldn't find a job in Olympia. I took a job in Seattle, and the commute became too much for me. Under current statute, I still have good cause for leaving work because in my occupation Seattle isn't in my labor market.

Under the change in the statute, the individual only qualifies for benefits if the work site changes. So if I in that same scenario took that job certainly knowing where Seattle is and how long the commute is and then decide I couldn't keep it up anymore and then I quit, then I'm disqualified. I would be considered to have left work for a personal reason, and I would not meet the criteria.

However, if the employer said, "We are moving our plant to Everett," and so that substantially increases my commute time, and I say, "I can't do it and I quit," then you would have good cause under the way this statute is worded.

It uses a couple terms which may have to be dependent on case specifics: What's a material increase? I don't know that we want to go in and quantify that by time. But we will need to look probably at individual circumstances whether we consider a material increase in distance or difficulty of travel. It does add difficulty.

In the same scenario if I worked in Seattle and I worked the graveyard shift, well, the traffic and less so it takes an hour to drive each way. And then they switch me to day shift, and now I have a two, two and a half hour commute every day. That also could be good cause because the work site changed and that caused an increase in the difficulty

of travel as opposed to just distance. So it appears to cover both.

Any comments or questions about that section?

MS. BACIGALUPO: Well, there's an "and" to this section, though.

MS. MEYERS: "And afterwards the commute is greater than is customary." You are absolutely correct.

If somebody -- and I use the aircraft mechanic as an example. If somebody lives in Olympia and their occupation

and the jobs they are looking for is as an aircraft mechanic, then Seattle is in their labor market area. It's customary for people who will work on airplanes to look in

the greater Puget Sound area, you know, the Seattle/Everett area for work. So, yes, that would be in their labor market area, even though it's a long commute distance.

So only if they said we are moving that job to Moses Lake, then that's certainly not reasonable.

MS. BACIGALUPO: Right.

MR. KNOWLES: So as I read the new statute, the statute talks about, quote, "the individual's work site changed." Now, to me this is an important distinction between the existing statute.

For example, I will just pose a hypothetical aluminum plant on the bank of the Columbia River, which has three or four different operations added. Let's say it has an extrusion mill. It has a mill that makes ingots, et cetera, et cetera. One mill works certain hours. Another mill works only day shift or graveyard shift. If a worker from the ingot mill now goes over to work on the extrusion mill,

it is a new work site. This is a change in the existing statute.

If that individual as a consequence switches from day shift to night shift, that may cause a material increase in the distance or difficulty of travel for that employee and

would qualify them under the statute, although they might be employed generally in the same overall facility or area.

And, similarly, it seems to me that the situation that we see most common is that in the construction industry the individual's work site with the employer has changed. That constitutes a material increase in distance or difficulty of travel and would constitute an allowance of benefits to

workers who currently, although they may be subject to dispatch within a particular geographical market might decline employment at a new work site location for the same employer on the basis that it constituted a material increase in distance or difficulty of travel.

So that's the determination that the department, it seems to me, needs to make on a fairly new basis. Of course, there is adequate statistical information available to the department if they so desire from the state department of transportation on the average commute time for workers in most labor markets in the Puget Sound region. I don't know about the availability of that like in similar information for areas outside the metropolitan areas of the state of Washington, but I would suspect that that information does, in fact, exist.

And the new statute, it seems to me, requires the State to actually have available that information in objective

form, rather than under the system of the general rubric of,

quote, "good cause" based on distance to the place of employment. The new statute specifically, it seems to me, requires that the department be in a position to evaluate that question in terms of some standard benchmark.

MS. MEYERS: Thank you. I'm going to move on to the next section then.

An individual has good cause for leaving work if their work site safety deteriorated, they reported that safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time.

Now, we have had quite a bit of discussion in our two

previous meetings on what exactly this means, primarily in the area of what is a reasonable period of time. The first meeting there was a suggestion made that we follow the WISHA requirement. However, when Susan contacted the Department of Labor & Industries, they don't have those types of specific requirements.

What will happen, if there's a violation, they will issue a citation which gives that employer a certain period of time to correct that deficiency depending on -- the time period depends on the nature of the violation. However, the employer can appeal that and frequently does.

And so in some cases there may be an appeal period that lasts a year or two before there's a final ruling that, in fact, a safety violation has occurred. And I don't

believe -- I'm not certain, but I don't believe that there is an expectation that claimants wait through that long appeal process before leaving.

And certainly at our second meaning we had a number of union members that pointed out that they advise their members when they are referred out on a job, if employer doesn't have the legally required safety equipment, they are not to start work. And so in that case a reasonable period of time would be immediate. Because their point was that in some cases, like if you are going up on a roof or down into a ditch or something, not having the proper safety equipment can mean life and death or certainly serious bodily injury.

So there may be some distinction as to what needs to be corrected immediately and what is perhaps something that -- you know, what's a reasonable period of time depending on

the type of violation that's occurred.

The other question we had about that is that in some cases people don't know that the work site is going to be unsafe until they get there. So the work site hasn't deteriorated. It was always bad. But the person certainly didn't know that at the time of dispatch or hire. When they get on the job, if they find out that it's unsafe and the employer refuses or fails to correct the safety violation, does that person then have good cause for leaving?

Now, the consensus, I think, from our first couple of

meetings was, yes, the employer should not reasonably expect people to work in unsafe conditions where those conditions violate OSHA or WISHA requirements. But I'm open certainly

to other comments or questions about this particular section you may have.

MR. KNOWLES: I don't believe that the legislation amends the refusal or loss of an offer of work that is not suitable.

MS. MEYERS: Correct.

MR. KNOWLES: It seems to me that the circumstance in which an individual arrives at a job site and finds that the employer lacks the requisite safety equipment falls under the existing statute which permits an employee to refuse an offer of work if the offer of work is not suitable.

So I don't think we need to worry about the person arriving at the job site and finding the job to be not workwise being covered by this situation. Because, in fact, the person who is in that situation hasn't voluntarily left work. They have not assumed new work. They have refused an

offer of work that is not suitable. It is not suitable because as a matter of law the employer is not meeting the safety requirements.

This statute, it seems to me, only kicks in once the employee commences work on the job site. And it's the idea that the work site, of course, is always represented by the

employer to the employee as being a safe work site. Because that's the general obligation of employers under our state WISHA act is to provide a safe workplace.

So the statutory presumption of a worker is that when he starts work, there's a representation made by the employer that, of course, the workplace is safe. It's implicit. So if they start work and they determine that, in

fact, the job site is not safe as represented, then that constitutes a deterioration in working conditions.

So the situation that somebody starts on a job site that they later learn is unsafe falls within the rule because the work site changed. The employer had represented it was a safe place on commencing employment. The employee now determines that the work site has changed. And that changed or it has deteriorated from what it was represented to be.

Then the individual has to take the next two steps to report the safety deterioration to the employer. "This is not what I thought it was going to be." Says the employee to the employer. "This place is unsafe. Please fix it." And then the employer says to him at that point, "No. I'm not going to. We have the requisite failure to correct the hazard within a reasonable period of time."

So it seems to me in interpreting this provision, an employee who starts work, determines that workplace hazards

exist, communicates that to the employer -- this provision by its express language, puts a burden on the employer, quote, "the employer failed," it says.

So unless at that point after it's reported the employer says to the employee, "Okay. We are going to fix that right now," that's a failure by the employer. And the employer should bear the burden of proof that they, in fact, did correct the hazard within a reasonable period of time. Because unlike other provisions of this particular statute, this does put a specific burden on the employer in this situation.

MS. MEYERS: Okay.

MS. BACIGALUPO: I don't know that we would change the fact that when an individual quits their job the burden is on them to show good cause. That's generally the first way it's looked at. Of course, the employer would have to respond. I agree with Mr. Knowles that the employer has to make corrections. But I think there has to be a little bit of the prudent person standard applied.

On a construction site, say, you have a stairwell that has a string of lights and the lights aren't working, and you are not using that stairwell that week. That's not a reason to quit. And if you see the general contractor's guy on the top of his ladder, that's a safety violation, but it's not a reason for you to quit.

But if your employer says to you, "Go up on the roof," and you say, "Do I have a follow-up harness?" Do I have a roof system on the roof edge?" and they say, "No, but you are going to do it anyway," of course you should quit. But if they say, "Oh, you are right. I don't have that set up yet. Here is a task you can do today. We'll do that later," then, of course, you don't have a reason to quit. It has to have an impact on you and your work. It can't just be that a roof system isn't in place.

MS. MEYERS: Okay.

MR. TUSLER: In promulgating rules over this section, I would not want the department to use the WISHA inspections by Labor & Industries as a standard. Because I can tell you many, many times that can take days, weeks, or months with the staffing load they have. Please do not use the standard

as proof of a hazard, because they just don't get to the job site even when called. That's not a criticism. It's a comment on their staffing level at job safety.

MS. MEYERS: And that's exactly what they told us is it could take a very long time.

MR. TUSLER: And we have many days where there have actually been injuries where people are hurt and no inspection.

MR. RAFFAELL: I don't see where this law changes what you have been doing all along necessarily in this arena.

And the one thing that you are looking at -- what it's going to boil down to is what the courts call -- did person act as

an individual under normal sensitivity -- did what a normal employee would have? And I haven't even -- what I have seen is you have always done a pretty good job of interpreting this.

MR. KNOWLES: The department's prior actions in interpreting this provision have been under the general, quote, "good cause" due to health, safety, or morals provisions that exist in the existing statute which mirror the federal suggested or the federal model rules for unemployment insurance that were promulgated in the 1930s.

The department has evolved quite a jurisprudence under that provision and in the past has correctly interpreted the law. The distinction is that the statute has changed.

And so the statute -- to respond to the NECA representative's comment, the statute now talks about, quote, "the individual's work site safety, the individual's work site safety.

So in the situation which was suggested where there was a string of lights down a stairwell, you are not working in that area. That's not within your work site safety. In the situation, however, which is more common, "We want you to go work in that work area underneath those four bozos that are working on top of ladders without harnesses. Just look out

in case they fall down on you and get out of the way."

That's a definite deterioration in the individual's work site safety, even though it's the unsafe acts of another employer or even the employees of another employer that are causing the deterioration in the work site safety.

So it seems to me that the -- again, as I said, the

burden needs to be on the employer here. The employee comes forward and says, you know, "Gosh, this was the problem." The burden is on the employer to show that they acted within a reasonable period of time. That's where the reasonably prudent-person standard comes into this matter, not as it affects the individual claimant, because that's not where the word "reasonable" is put in the statute. The word "reasonable" is put in the statute with respect to evaluating the conduct of the employer. And that does need to be evaluated on an objective standard. But the usual situation that we know in the construction industry is the employer says, "Go on. Get up there and get the job done."

MS. MEYERS: Thank you.

I'm going to move on to illegal activities and try to finish these two maybe by shortly -- a little after 11:00 so we can take a quick break.

Reason 9 is the individual left work because of illegal

activities in the individual's work site. The individual told the employer about those illegal activities, and the

employer fails to end those illegal activities within a reasonable period of time.

On this particular one, first our question was, what constitutes illegal activities? We believe we are not talking just about crime. We are also talking about violation of civil laws or regulation just as discrimination, sexual harassment, not paying proper, you know -- complying with the Department of Labor & Industries payment on pay periods, people whose paychecks bounce, et cetera. That would be included in there.

But in addition, this section creates a little more difficulty for us in administration because we are almost always, I think, going to have to be looking at evidence from the claimant. Because I think it is highly unlikely that an employer will say, "Yes, there are illegal activities going on in my work site. And, yes, they told me about them. And, no, I'm not fixing them." I think that's unlikely.

So what, generally, I think we are going to have to do is get some information from the claimant that at least provides us with a reasonable amount of evidence that, in fact, there were illegal activities occurring and they told their employer, and the employer didn't fix them.

Okay. Comments?

MR. TUSLER: In the statute what if the illegal

activity was promulgated by the employer and the employee could not reasonably say, "Hey, you are running a chop shop."

MS. MEYERS: The comments from the previous meeting -- and, actually, we think that's a pretty reasonable comment -- is the section says that illegal activities in the individual's work site, they have to be told to the employer. It doesn't seem to require, and it doesn't seem a reasonable requirement, that if the employer is engaging in illegal activities that they have to go tell the employer, "Hey, did you know you are doing this illegally? And I want you to stop it." Because that undercuts other sections of law, for example, the Whistle Blower Act or other pieces of the law.

And particularly if the claimant says, "Stop it or I'm going to the police." That gives the employer an opportunity to hide evidence. And, again, I can't speak for the legislature, but it doesn't appear to me that that would be the legislative intent to give employers time to hide things.

So if the employer is actually -- an example, I think, that was used in the hearings, or at least one of our meetings, is if the employer is running the meth lab, then you don't have to tell the employer, "Hey, do you know you are running a meth lab and you should not be doing that?"

That's not reasonable.

But if there's a work site, say, "My coworkers are

dealing drugs. And I don't like it, and I think it should be stopped." And then the employer doesn't take action to stop that illegal activity, then that's something else. It's something that you need to make the employer aware of.

I think that from the input we received in the previous meetings the employer should have an opportunity to correct the situation before an individual should quit. When the employer is, in fact, the person committing the illegal activities, that doesn't seem to be reasonable.

MR. TUSLER: Could I ask that your rules promulgate that interpretation that it does not impair the employee's rights as a whistle blower or his own safety by telling the employer that he's committing a crime?

MS. MEYERS: Okay.

MR. KNOWLES: Unfortunately, this is one of those areas where I have to say you are in a very difficult position.

Because the statutory formulation uses what we call legal parallelism of another provision to the statute, specifically the proceeding provision of the statute. If you promulgate a rule that's got an inconsistent application involving the same language, you are going to have some really serious problems in making those rules defensible in subsequent legal action.

However, it does seem to me that the claimant, the individual who is put in this situation, has very few choices in the situation that they can really exercise at this point. And it seems to me that this is one situation that's most easily resolved, again, from a statutory construction problem by putting the burden on the employer

to come forward with information and creating a statutory presumption that if the employer doesn't -- or a regulatory presumption that says, okay, employer, you have got the burden to come forward.

And the employee comes forward and says, "The employer is not paying overtime, not just to me but to other people in the workplace." Or the employer is actually harassing X, Y, Z. The burden is on the employer at this point to come forward with evidence. And if they fail to do so, the regulatory presumption should be that there is, in fact, illegal activity going on.

The reason why that's a permissible form of statutory construction is because the statute talks about the, quote, "employer's failure." The burden is on the employer to show that they met their burden in this particular situation.

It seems to me that an individual who leaves work

because of illegal activity in the individual's workplace where the situation constituted a crime, actual criminal -- like the employer is running a chop shop, for example, or

the employer is running a meth lab, for example, wouldn't reasonably be treated under this particular provision, but would be treated under the next provision of statute as opposed to this provision. It seems to me this provision should be limited to situations where the employer's illegal activity is their failure to comply with existing wage-hour laws, health and safety laws, laws against discrimination, et cetera, et cetera.

And the situation where the individual is being asked to engage themselves in illegal activity as a condition of

continuing employment and the employer is the one running the scam, operation, dope dealing, meth lab, chop shop, boiler room for insurance fraud on the elderly, et cetera, et cetera, et cetera, that would fall under the tenth provision here.

MS. MEYERS: Other comments before I move on to the tenth?

MS. METCALF: I want to just check with Marcie and see how she's doing and see if she could go through one more section.

(Whereupon, the reporter responded affirmatively.)

MS. MEYERS: The tenth and final reason in the new voluntary quit statute is that an individual's usual work was changed to work that violates their religious

convictions or sincere moral beliefs.

Currently under existing law, as Mr. Knowles referenced, we make these decisions based on the broad language of whether the work violates somebody's -- is contrary to health, safety, or morals. So the individual could have changed their beliefs, converted to a new religion, or adopted different beliefs for whatever reason; and they could be allowed benefits for if they quit because they changed. Now this seems to require that the usual work has to have changed.

So if they require you -- you know, you have been doing one job along the way, and then an employer says, "Now I want you to do this other job." You are working on, you know, developing chemical weapons or something, and that

violates your sincere moral beliefs. You could quit with good cause because the employer has changed your working conditions, but not if you develop new -- you change your opinion.

You are a bartender and you became a member of Alcoholics Anonymous. And you decided you no longer want to work around liquor so you quit. But you were a bartender, and you certainly knew liquor was served at the time of hire. Now that would be considered a personal reason for quitting and not a quit for good cause.

However, if you worked in an establishment that didn't

serve liquor, and they got a liquor license, and you are

really opposed -- your sincere moral beliefs are opposed to serving liquor, then that would be because the employer changed the work site.

MR. KNOWLES: A couple of comments. Again, we see the word "usual" work used in the same way that it's used in subsections (v) and (vi).

MS. MEYERS: Right.

MR. KNOWLES: It seems that the focus, again, needs to be on the individual's usual work.

Again, the circumstance: If an individual reports to work and determines that the work is not suitable for them for reasons of health, safety, or morals, under the current statute they are refusing an offer of work. And that's okay because it's not suitable work. This provision only applies when the individual begins or commences work.

Again, it seems to me that the same rule would apply in the situation where an individual is starting to work on a

job site. The representation is made to an employee when they start work that this is work compatible with, certainly I think, generally accepted standards in the community for, you know, specific -- you come to work, and you don't expect to be asked to do particular kinds of acts, for example.

I can think of some cases which I have seen recently which would need to be explored under this. Quite recently

I represented a janitor who went to work for a community college cleaning bathrooms. He was Islamic in his belief system.

And he learned after working there for a relatively short period of time that the expectation was that he clean

toilets without gloves. And this, of course, violated his firmly held religious beliefs. It also happened to violate federal and state health standards for the cleaning of bathrooms. But let's put that issue aside.

Because the employee now is being asked to do work that violates their religious conditions that pre-existed. It certainly isn't a reasonable expectation. It seems to me that he should, under this rule, be permitted to claim benefits because the work was changed in this situation such that this work now violated his individual, religious convictions.

I think the question here needs to be an inquiry into what it is that the employer tells you at the time you come to work about what the work is going to involve. And then having commenced work, if you find that it doesn't meet those representations and it violates your religious convictions or sincere moral beliefs, that you would be

permitted to claim benefits.

I would also read the words "sincere moral beliefs" to be coextensive with the word "creed" that appears in

RCW 4960 as being a protected basis against which persons cannot be discriminated. And I would, moreover, point out that I believe under existing Washington law there is an obligation on employers to accommodate the religious beliefs of an individual if they make such a request.

And so it seems to me that part of the inquiry may well need to be on whether or not the employer is willing to make those religious accommodations or creed accommodations in the work situation that is different than those that they

represented to the employee.

Another example: A follower of the Greek Orthodox faith was told at the time of hire that, of course, she would have Sundays off. Subsequent change or realignment of personnel resulted in her being forced to work Sundays. This, of course, violated her religious convictions that she needed to be present at the church on particular Sundays and caused her to leave work for reasons of her religion beliefs.

It would seem to me that an employer who failed to provide religious accommodations for an employee also violates subsection (ix) of this rule because that's an illegal activity by the employer. Refusal to provide religious accommodations is illegal.

It also seems to me that the definition of what constitutes sincere moral belief -- for example, the City of

Seattle has a statute that also identifies, in addition to creed, the term, "political ideology" in the definition of what constitutes a sincere moral belief. And it seems to me that what the statute has written would include both those concepts "creed" as they have been defined by court cases and the concept "political ideology" as it has been defined by court cases in interpreting Washington state statutes.

MS. MEYERS: Okay. Any other comments or suggestions on this section?

We need to give Marcie a quick break here. Her fingers are probably pretty tired. So could we take about ten minutes and be back at about 20 after? Thank you.

(Recess taken.)

MS. MEYERS: All right. Let's move on to misconduct, Section 6 of the bill, page 8. Again, beginning with claims that are effective on or after January 4 of next year there is a new definition of misconduct.

The current statute says that misconduct is when an employee's act or failure to act in willful disregard of the employer's interest where the effect of their act or failure to act is to harm the employer's business. The new definition of misconduct, of course, significantly changes that definition. And also the statute adds a new definition of gross misconduct which was not in existence prior to this.

Misconduct has four elements: It is willful or wanton

disregard of the employer or fellow employee's interests; deliberate violations or disregard of standards of behavior that an employer has the right to expect; carelessness or negligence that causes or is likely to cause serious bodily harm; or carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest.

In subsection (2) then it enumerates a number of reasons that constitute willful and wanton disregard. These include inexcusable tardiness, insubordination, dishonesty, absences, illegal acts, et cetera.

The statute subsection (3) says that misconduct cannot include inefficiency, unsatisfactory conduct, or failure to perform well which is the result of inability or incapacity. It doesn't mean inadvertence or ordinary negligence in isolated instances. And it does not include good faith

errors in judgement of discretion.

The definition of gross misconduct has two elements: It could be a criminal act in connection with the individual's work for which the individual has been convicted in a criminal court or has admitted committing; or gross misconduct could be conduct connected with their work that demonstrates a flagrant and wanton disregard of the employer or a coworker's interests.

We have only fairly recently built up a body of case law regarding the previous definition of misconduct, and so this is going to be going in a new area for us. This statute is almost word-for-word identical to Montana's misconduct statute.

There are some things that we have had some questions about. But I do want to say something in the beginning, because I know it's raised some concerns for employers in that although the new definition of misconduct does not specifically say that there must be harm to the employer, we believe that existing case law still requires that there be some form of harm to the employer.

Each of these reasons that define misconduct implies that the employer is harmed in some way: willful or wanton disregard, carelessness or negligence, deliberate violations of standards of behavior, those types of things. Some harm to the employer is implicit.

And we are recognizing that case law has said that the harm doesn't have to be tangible. It doesn't have to be a dollar loss or a piece of equipment loss. It could be workplace morale or, you know, that type of thing, a

business reputation. There could be a variety of different things that could be construed as harm to the employer. But harm, we believe, is still implicit within the statute. To be misconduct it has to be connected to the work, and there

has to be some violation of the employer's interests.

We are not certain, again, on how some of these sections are going to be interpreted. For example, the regular misconduct includes willful or wanton disregard of the employer's interest. Gross misconduct is flagrant and wanton disregard of the employer's interest.

We contacted Montana to see how they make the distinction between something that's willful or something that's flagrant. And quite frankly, they don't have really

any case law on this. They hardly ever use this. Of course, Montana's case load is substantially smaller than Washington's.

And I imagine at some point the issue of whether conduct is flagrant and wanton will come up. And we really need to define some standards to give our adjudicators, because we don't want to have every staff person out there deciding on their own what they consider to be flagrant and what they simply consider to be willful.

There has to be a standard there, because the penalties for gross misconduct are substantially higher than for regular misconduct. There should be some additional factors or the behavior needs to be so egregious that it warrants the additional penalty.

And it's basically placed on a level as a criminal act because that's the other definition of gross misconduct. So

it has to be some kind of behavior that's so outrageous. I guess that is what we are looking at, trying to come up with some definition of how to distinguish between willful acts and flagrant acts.

We have had a number of questions about when warnings are given by the employer. Right now we look to see if those warnings have some nexus to the actual reasons that the person was terminated.

For example, if the employer warned somebody two years ago about being tardy, and it's now two years layer and they fire them for being tardy, we probably would say that's not following warnings by the employer because it's so remote in time. But certainly if they warned them last month or the

month before and that employee is late again, then certainly that individual has been warned about their behavior.

It's similar to absences, repeated and inexcusable absences. There are some questions about what's inexcusable. Sometimes an employer may have a standard that says you can't miss more than, I don't know, three days a month or that's inexcusable regardless of the reason. But the claimant has a doctor's note that says, "I'm excused. My doctor is telling me I cannot work." So do we go with the employer's definition of what's excusable, or do we go with what the physician says?

Obviously, now if the person has a doctor's note that

says they can't work, then it's not misconduct. And I don't think it would be in the future, but we need to address some of these various issues as we draft our rules and procedures and develop our training for our adjudicators.

The other significant change on misconduct -- well, it comes under gross misconduct -- that we are wrestling with how to interpret this is the section of the law that says the person has committed a criminal act of which they have been convicted in criminal court or admitted committing.

Our existing statutes provide that an individual -- it's not under the misconduct definition -- but if an individual is convicted of a work-related felony or gross misdemeanor, the wage credits from that employer can be canceled.

And that statute says convicted or admitting committing to a competent authority. Now we have defined competent authority as essentially police officers, somebody in the

adjudicating process like a judge, a hearings examiner or the licensing -- if you have a license, then the licensing authority can be included, say, if your license was revoked for this behavior.

This new language strikes out the language "to a competent authority." So we are wrestling with what types of admissions should be included here.

Right now the department isn't a competent authority.

We don't -- if somebody tells us that they did something that was illegal, we still don't consider that for the purposes of striking their wage credits because they haven't admitted it to a competent authority under our regulations.

And we are not certain that we want to impose this burden on our staff, because that could open us up to then being subpoenaed or witnesses in other proceedings if we define ourselves as a competent authority. And so admissions of criminal acts made to us possibly could result in our staff being called to testify in criminal proceedings, and I don't think we want to do that.

And similarly, should we leave the definition or use our existing definition? Should we include admissions to an employer, to a coworker, to neighbors? I mean, what types of admissions are we looking at? Because, as I said, we have to presume that the legislature meant something by deleting "to a competent authority." So what admissions are counted?

And I'm going to open it up now. And Mr. Knowles has comments.

MR. KNOWLES: Having litigated most of the precedential

cases that deal with the definition of misconduct that exist in the current statute, I have certainly argued this case in front of most of the courts in this state. It seems to me that the new statute is a marked departure from prior

legislative or judicial formulations of misconduct that our state has gone through. And I think a little bit of the background in legislative history and judicial history is important.

In the construction of the misconduct statute that was laid down by our supreme court in Macy, harm to the employer was no longer an element of the definition of misconduct. In response, we had the enactment by the legislature of

RCW 50.04.293 in 1993 with the express reference that the Macy decision had eliminated the, quote, "harm to employer." And you can see in the legislative history of the Macy decision that that was a specific finding by the legislature that that definition of misconduct was too narrow and, therefore, needed to be amended by statute.

With the new statutory formulation of the misconduct statute, it seems to me that harm to the employer is an element that is only found in one form of willful or wanton behavior that is enumerated by the legislature and that, of course, is in subpart (2)(g). The exclusion of that standard in all other provisions of the statute evidences a legislative intent to apply a harm-to-the-employer standard as a standard only found in subsection (g).

With respect to the question that you were last opining on, the question of gross misconduct, the statutory formulation is not unintentional by the legislature.

Because the legislature eliminated the words "competent authority" and instead substituted the requirement that the admission needs to be made in a criminal court. "For which the individual has been convicted in a criminal court, or has admitted committing..." also in a criminal court.

This is a referenced to an Alford plea, A-L-F-O-R-D, where the defendant appears in front of the court and says to the court, "In lieu of conviction, Your Honor, I'm going to take an Alford plea. And my plea is I plead that there are necessary facts predicate contained in the records that are before the court to convict me of this offense, and I'm ready to subject myself to the jurisdiction of the court and

take whatever sentence the court may hand down."

This is not, as we have learned in many years of criminal jurisprudence, the same as a conviction. An Alford plea says, "I'm not admitting guilt to the offense, but I'm admitting committing the predicate act.

And this can, of course, be the future basis for some kind of a reversal or in some cases an elimination or the purging of a conviction. They may be exonerated, may have the restoration of rights, et cetera, et cetera. So there's a big difference between these two standards legally. It seems to me that's what the legislature is talking about when they put this in.

I would read the subsection (4) question to require an

admission in court. So we don't need to worry about police officers. We don't need to worry about employment security department officials, because the legislature knows what it means when it talks about "or has admitted committing." We find the same statutory provision exists in other statutes, that legal parallelism, again. The same statutory formulation should have the same meaning in other provisions of law.

More difficult, however, to comprehend what the legislature really intended, but I do not see any other formulation in the following conclusion: That the second clause of subpart (4) "...or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or fellow employees," must have the same meaning in that particular provision that it has in subsection (2) and

subsection (1)(a).

That is to say, I see the words "willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee" in (1)(a). I see it further defined in subsection (2). And I see in subsection (4) that the same words "wanton disregard of and for the rights, title, or interest of the employer or a fellow employee" appear.

The only statutory construction that I can put on this

is that these three sections are intended to have the same meaning. When the legislature uses the same words in reference in the same statute, it is understood, I think, that they have the same statutory meaning.

The big distinction between subpart (4) and subpart (1)(a) and subpart (2) is the use of the word "flagrant." It seems to me that in order to disqualify a person under subsection (4) it's necessary for the employer to bear the burden of proof: No. 1, under subsection (1)(a); No. 2, that it's the kind of act that falls within subsection (2), because subsection (2) is not limited, so it is of the same kind and character as the acts that are listed in subsection (2); and finally, the employer also has to bear the burden of showing that the violation was flagrant.

So they have to show that -- if the legislature had intended this to be exactly the same as subsection (1)(a) and subsection (2), they would have specifically enumerated it and used the same words, but they did not. They eliminated the word "willful" from subsection (4).

So what we have in subsection (4) is you have to commit

the kind of conduct that's described in (1)(a), except it has to be wanton conduct in (1)(a). Willful conduct in (1)(a) will not suffice. In subsection (2), it has to be conduct that meets the definition of wanton in subsection (2). Willful will not suffice. And when we arrive over in

subsection (4), it has to be flagrant and wanton in order for the statutory disqualification to apply.

So it limits the cancelation of wage credits to situations where the person either is convicted or makes a plea in criminal court and where the employer bears the statutory of burden of proving wanton conduct under (1)(a) and wanton disregard under subsection (2) and additionally bears the burden of proving flagrant conduct.

Examples to me of willful conduct which is not flagrant is something which the employee engages in which he conceals from the employer in some way. So you can't be disqualified under the new statutory provisions if, for example, you willfully put down information on a time keeping record or something, but it's not wantonly done. And you must also do it flagrantly and wantonly in order to be disqualified from and purged from wage credits.

So the fact that you initially do the act is not enough to disqualify and take away the wage credits. It may be adequate to disqualify you from benefits under subsection (1)(a), but it's not going to be sufficient to purge your wage credits unless it was done in some way that was both wanton and flagrant under subsection (4).

And the misconduct statute as further cast by the legislative enactment deals with three concepts that I think

are other than the wanton and willful, which are a separate

classification. And they are found in subsections (1)(b),(c), and (d).

And I believe that these -- for example, a deliberate violation or disregard of standards of behavior which the employer has the right to expect of an employee. "Has the right to expect of an employee," this would fall or would require a reasonableness showing. And it would also require a showing that the employee engaged in deliberate violations or a deliberate disregard of a standard of behavior that a reasonable employer -- so the conduct by the employee, the focus needs to be on deliberateness.

In the area of carelessness or negligence in subsection

(c), the requirement that the carelessness or negligence that actually causes or would likely cause serious bodily injury to the employer or a fellow employee requires a showing of serious bodily injury. And by that, I don't see any requirement that -- for example, negligence that might result on a construction site might result in a puncture wound, failed to drive a nail down, I don't think that constitutes serious bodily injury under the statute. So I think that there's got to be a finding of a likely potential of serious bodily injury. And that should be measured by an objective standard like the WISHA-type regulations, et cetera, in a situation.

And understanding that under WISHA regulations, as the

department has just pointed out, the employer has a reasonable period to correct an unsafe working condition that's likely. So if an employee engages in conduct which an employer would have a remedial period to correct, you know, forget to put the handrail up on a particular opening and if the inspector came out and said, "Well, okay, you have got to put that up." That's not going to be disqualifying for the employee under this provision.

And "...carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard to the employer's interests." It seems to me that the question of degree, for example, is best examined under the standards that we have set forward in things like the Shaw (phonetic) case. Mr. Shaw was late 14 times to work in a six-month period. However, on the last occasion from which he was discharged by the employer, he was late because there

was a power outage. In that particular situation, Mr. Shaw got his unemployment benefits. But that would be distinguished here by the degree of carelessness.

So it seems to me that the statute itself needs to be drastically rethought from the definition that I have just heard the department put forward here. It's a really fairly straightforward matter of statutory construction.

But I don't read anyplace in here that the department is allowed to use this with terms, conditions, or

preconceptions that are not stated in the statute. Because the legislature deliberately eliminated provisions that it put into the statute after the Macy decision. And harm to

the employer is not a statutory provision that I see recreated here in the statute except in subpart (g).

So in terms of the definition, it seems to me you have got a (1)(a) type of misconduct which if the employer can additionally show wantonness and flagrantness might lead to disqualification. And examples of (1)(a) type misconducts are enumerated in subpart (2), only one of which involves harm to the employer's interests and then three other forms of misconduct which actually are very narrow. Most reasons for which employees were previously discharged for misconduct may no longer fall within the statutory definition of misconduct.

So although it certainly does not appear to me that it was the intention of the business community to have this provision drafted in a way that would expand the number of claimants that would be eligible for benefits, there may well now be a large class of people that were previously

ineligible for benefits who now will be eligible under the new statute.

MR. STEVENS: My name is Larry Stevens, and I guess I will probably have to wait to read the transcript to understand everything that the counselor just spoke to. I

had a hard time following all of that through, but I guess I do -- I'm reading, whatever it is, Section 6, subparagraph (4), I guess, which is what he was talking about early on.

It appears to me that in this section we have got a definition of misconduct. We have got a definition of things that are considered misconduct even if they aren't willful and wanton. And then we have got a definition of

what misconduct is not. And then we have got a definition of gross misconduct.

And I think it is pretty clear that the definition of gross misconduct would be a conviction in criminal court, and it also would be admitting committing it. If I understood Mr. Knowles, he seemed to suggest that this admission had to be in court also. And I don't see that at all. It says, "...or admitted committing," and it says, "or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard..."

I guess maybe I didn't understand his comment. But it seems pretty clear to me that the admission could be outside of an Alford plea.

MR. RAFFAELL: I will agree with what Mr. Knowles said about the harm element being eliminated. However, I agree with what Larry is saying on the issue of it does not have to be admitted in court. Section (8) does further address

that issue. And it says, "An individual who has been

discharged from his or her work because of a felony or gross misdemeanor --

MR. KNOWLES: That's what we repealed.

MR. RAFFAELL: "Are each amended to read." I don't see where that's repealing it. It's just amended and it reads that way. On or after -- with respect to claims that have an effective date before --

MR. KNOWLES: That's the current law.

MR. RAFFAELL: Okay. Are they readdressing that?

MS. MEYERS: Okay.

MR. RAFFAELL: And then in Section 9 they refer to item

(3), "The employer shall notify the department of a felony or gross misdemeanor of which an individual has been convicted, or has admitted committing to a competent authority, not later than six months following the admission or conviction."

And I guess it goes back to the definition of competent authority again. And unlike Washington, Oregon, I believe, has always held a competent authority to be a person that has the authority of the commissioner or, in their case, the administrator to write decisions. And they generally even put that in their fact-finding that the person admitted to them.

And if you are afraid of going to court. If they have a good attorney, they probably would subpoena that person

that put that in there anyway. And I don't see where it's been a problem with Oregon employees going to court. I think it's just part of the due process of the system.

MS. MEYERS: Okay.

MR. KNOWLES: So we are clear on the issue of statutory construction, which apparently was bypassing the NECA people here, the reason why this is convicted in a criminal court or has admitted committing, it's an either/or. Or is the operative word here. And the conviction or admission would be read to be within the criminal court context. The statutory provision to which the representative from AWB referenced has to do with the department. The employer notifying the department for a wage cancelation for felonies or gross misdemeanors. And that's contrasted with the statutory provision under subsection (4).

It seems to me that if the employer wants to get the wage credit for the gross misconduct provision, they have got to notify -- and it's a felony and gross misdemeanor and it's a felony or gross misdemeanor, the employer has to notify the department within six months.

The other part of that statute has to do with determination about conduct that are not felonies or gross misdemeanors that are just within the general rubric of some type of misconduct which is further rarified or funneled down to gross misconduct.

So if we read the statute in its new form, you know, as it has been amended by the legislature, the requirement 2 of the new Section 9 on page 10, "An individual who has been

discharged from his or her work because of gross misconduct," there's no limitation that's set forth there.

In the second, that deals with the individual that falls within either the court-type situation or the flagrant and wanton disregard, the general misconduct, conduct situation. But it's the obligation of the employer to notify the department within six months about a felony or gross misdemeanor that qualifies under the first clause of subsection (4).

That is to say, usually the situation is that the employee has been discharged. They are gone. They were stealing drugs out of the hospital morphine lock up. The employer finds him, catches him. They are out the door. They get a conviction. Now the clock starts to run for the employer to go to the department and say, "Hey, I want relief from benefit charges in that particular situation."

Because the misconduct -- the request for relief is going to come at some time after the conduct at issue.

Or the employer can pursue -- right at the time of the discharge they can pursue a misconduct case in which they bring forward evidence and prove conduct which is in flagrant or wanton disregard and, again, no harm to

employer's interest is shown. The fact that they didn't get away with the drugs is not an issue. And that's a determination that is made right at the time of the adjudication rather than six months later.

So if the employer wants to bring a gross misconduct claim under subsection -- what I will call the second clause, the conduct clause -- they need to do that right at

the time of the application for benefits. If they want to claim an exception under the gross misdemeanor or felony conviction route, then they need to do it within six months of that actually occurring. Otherwise, this provision doesn't apply. So there's --

Let's say an employee has been terminated. They are gone. The employer doesn't pursue a gross misconduct disqualification of benefits. They get convicted. The employer's time to make that report to the department runs for six months. They don't get convicted. The employer doesn't have an opportunity to move forward with claiming that. And they cannot then go back and say, "Just a second. They didn't get convicted, but, you know, we would like to go after them now because we think it falls in subsection (2) here." That's an adjudicatory decision that need to be made. It needs to be finalized at the outset of the

application process.

The second part, the other type of disqualification for

a felony or for a misdemeanor, that is to say, a criminal act as defined in subpart (4), the employer's time to deal with that runs for six months. But under RCW 50.20.160 s 3, a determination of allowance of benefits needs to become final at that point.

And an employer's failure to come forward at that point and make an allegation -- remember, the employer has the burden in the gross misconduct case. If the employer doesn't make an allegation of gross misconduct at the time of the application for benefits, they don't later on get a second bite at the apple under the statutory formulation.

To hold otherwise would be to violate the California -- or the Java case. That is to say, benefits have to be made freely available for people at the time for the purpose of promoting the spending power, which is one of the statutorily enumerated reasons why we have the statute in the preamble, with or without the liberal construction, is to promote the spending power. And that still remains the overall objective of the employment security system is to promote spending power.

And that's defeated if claimants have to hold that money for a period of time to wait and see if the other shoe is going to drop by the employer. The Java case says it violates federal conformity if you have a system that puts people in that kind of a limbo situation for as long as a

month.

MS. MEYERS: Right. I don't think there was any proposal to make people wait until the criminal case has run its course. Gina. And then we do need to move on.

MS. BACIGALUPO: In terms of when an employer can assert a claim, there's already rules on redetermination, and I don't think that those are being changed. I don't think that they are being affected by this.

MS. MEYERS: Right. The statute on redetermination hasn't been amended.

MS. BACIGALUPO: And I know that there are times an employer gives information after the fact because they never knew about the initial claim. For instance, if you have an electrician who worked for you and then was on standby and they have got an open claim. If they just continued a claim

after they had been fired, no new notice comes out. I get no opportunity to say, "Wait a minute. Here's my answer." And then you get a base year notice -- no you have already gotten that because the claim was already open. So you get a quarterly statement. Then you realize "Oh, my gosh, he's collecting. He got fired. I never saw that he even applied. Of course, you can go at that point and assert your claim.

The statute under Section 9(3) does say that the employer will notify of the conviction, but (4) burdens the

claimant with reporting that exact same information. And so the claimant has to be held accountable if he himself has

not reported it.

And I'm wondering is RCW 50.20.070 still a part of that statute or has that been eliminated? That's the fraud.

MS. MEYERS: That's still there.

Okay. I'm going to talk real briefly about Section 9. Currently an individual who is discharged for misconduct is subject to a denial of benefits for seven weeks and until they have earned seven times their weekly benefit amount. That is changed in the new statute to ten weeks and ten times their weekly benefit amount. So the penalty for misconduct has been increased.

In addition, if they have been discharged for gross misconduct, they will also have either all of their hourly wage credits from that employer canceled or 680 hours of wage credits, whichever is greater.

So for example, if their separating employer -- they only worked 200 hours for them, that means that we need to

take 480 other hours out of their base year. And our questions in the previous meetings, one of them has been, What if there are multiple base year employers?

Say the claimant has three other base year employers and we have to take 480 hours away. It wouldn't be fair just to take them from one employer because that employer

then gets the relief of charges. Because only the wages that are used as part of their claim are charged to the employer.

So what we discussed previously is doing a proportional change. Say you worked six months for an employer and a month for another and three months for the third. Then, of

course, the first would get most of the 480 hours and a small amount to the second one-month employer, and then give the remainder to the third. And so to do it in that way.

The other piece. Currently, when a claimant is convicted of a felony or gross misdemeanor, this language is here. In current law, the employer needs to notify us within six months, and the claimant is supposed to disclose it upon application.

In the current statute, that's not written in the misconduct law. That simply says that if the employer notifies us of a conviction that's related to the work, that we will cancel all the wage credits that that employee earned from that particular employer. We don't go and get other wage credits. It's just -- so in the future, that employer would never be charged for that claim because we have canceled all of that employer's wage credits.

So it's not technically a misconduct. It may be

misconduct, but there are two separate statutes currently. And now the commission of a criminal act is part of the

misconduct statute. It's actually a new definition of gross misconduct which was not there prior. We had misconduct, which had a specific penalty. And then we had felonies and gross misdemeanors connected with work which resulted in a cancelation of wage credits, but may not have resulted in the seven-by-seven denial of benefits because we have already paid them, or they qualified based on a later employer, the last employer was separating. And we can go back and take another employer's wage credits out which in many cases reduces their weekly benefit amount. But it's

not necessarily misconduct under the current statute.

The last piece that I wanted to point out because it just kind of occurred to us just in the last couple days is subsection (5) of Section 9: All benefits paid in error under this section are recoverable, notwithstanding 50.20.190, which is the waiver of overpayment section, or 50.24.020, which discusses the offers and compromises.

So if we have all the facts -- and we are not talking fraud. But right now if we pay a claimant, we had all the facts of the case, and we decided it was not misconduct so we began paying the claimant, and the employer repeals and we were reversed, currently that claimant was not at fault in the overpayment because they told us all of the information. It was not fraud or nondisclosure. The judge has reached a different discussion. So the claimant would

be eligible to apply for a waiver.

Based on the wording of subsection (5) there, it appears that that will no longer be true. The claimant is liable for repayment of those benefits that were paid in error. They can't apply for a waiver. And they can't do an offer of compromise if it was misconduct if the ultimate decision was misconduct.

MR. KNOWLES: Unfortunately although this may be one of the areas where the employer felt they really got a hot dig in, they have a real problem with federal conformity. Because the requirement that overpayment of a benefit be provided based on equity and good conscience is a long-standing part of federal jurisprudence as it applies to these programs. And this creates a real federal conformity

problem for you.

The department cannot create a set of circumstances where the disqualification for misconduct which is reversed -- a fairly debatable question is reversed, and there is no opportunity for a waiver of benefits that has been overpaid. They cannot institute that policy because it violates both the holdings of the US Supreme Court in the Java case and would also violate the requirements of waiver of overpayments that exists under the Social Security -- 26 USC 3304.

So the problem with this is that you cannot have a

situation where there is no waiver of overpayments. As much as the business community may desire this, it's

unfortunately not statutorily permitted. And it will create some problems for the department if you attempt to enforce it that way.

The determination that benefits can be waived under the, quote, "rubric of equity and good conscience," though, I will point out, is not at present a statutory formulation either under the current -- simply the practices of the department. And there's nothing in the new statutory formulation that requires you to do anything different than what you have done previously.

MS. MEYERS: It is in regulation.

MR. KNOWLES: That's exactly right. But I'm just saying that there's no statute that currently supports that. It's a requirement of federal law, though, that you interpret your statute that way so that, quote, "as it applies" the statute doesn't violate federal conformity and

the express holding of the Java case.

And so that's a problem that the department can either not correct by regulation with the results that you will face litigation, or you can keep the existing regulations in place and continue to conform just as you did before there was a statutory enactment that talked about this issue.

MS. MEYERS: Well, we expect to face all kinds of

litigation anyway.

MS. BACIGALUPO: If I understand 50.20.190 correctly, it does say that an individual can request a waiver or an offer of compromise if they were not at fault.

And I think this statute is saying, if you collected prior to a decision in this case, you knew the risk you were

taking. You told the story the way you told it. And if the court looks thoroughly through all the facts and finds that you were guilty, it's your fault that you collected the benefit and you are not eligible for the waiver.

The whole concept of the waiver isn't gone. Just the rule says that if you are at fault, you cannot get a waiver. And I think it's consistent with what you have been doing.

MR. RAFFAELL: If I remember right, there are a number of states that don't use an equity waiver at all. And it's not, to my knowledge, a federal requirement that we put that in there. I think the Department of Labor has always said that the issue is up to the state to decide.

My question is regarding the removal of the wage credits. You are talking about the additional 480. And if you remove -- not wage credits, but hours -- are you removing wage credits that are attached to those hours?

Because what I'm looking at, if you remove wage credits, is this going to affect the claimant's eligible weekly benefit amount?

MS. MEYERS: Yes.

MR. RAFFAELL: And if it is, I assume that if they have got two or three different base year employers they could have different wages per hour and so -- if you are taking a percent for each. And then it goes back a step further if those employers properly responded as base period employers, they are either eligible for relief or they are not eligible.

So if you go back and use a third or 33 percent for three employers -- they each get a third of that relief --

all that you are doing is you are just reducing the amount that person is paid. So for somebody who is getting relief anyway, it does not affect. Those employers that don't get relief, they will be charged whatever the reduced amount is; is that correct?

MR. KNOWLES: Your confusion is over cancelation of wage credits when we close the employer for whom the finding of gross misconduct or conviction of a felony --

MS. MEYERS: Not necessarily, no.

MR. KNOWLES: Well, the gross misconduct, clearly. The conviction of a felony statute here deals with, say, all hourly wage credits based on that employment.

MS. MEYERS: Or 680 hours --

MR. KNOWLES: Of wage credits, whichever is greater. That's only in the situation where there's been a --

MS. MEYERS: Gross misconduct.

MR. KNOWLES: -- gross misconduct based on -- I take that back.

It doesn't seem to me that if the weekly benefit amount is reduced that the claimant can still qualify for benefits with 680 hours of wage credits. It's only the employer for whom the disqualification was imposed gets the benefit of that.

MS. MEYERS: I'm not here to debate. But what it appears to us to say is that all the hourly wage credits from that employment or 680 hours of wage credits, whichever is higher or greater, is canceled. So if you only worked 100 hours for that employer, then you need to take 680 from some other employers or 580, because you have got 100 from

this employer, and you have still got 580 to take out of their base year.

MR. KNOWLES: The statutory provision doesn't talk at all about tax relief for the employer. It talks about cancelation of wage credits to the individual employee. I don't see any lessening of the employer's tax burden under this particular provision. I only see the cancelation -- it says "an individual shall have all hourly wage credits based on that employment canceled."

MS. MEYERS: That is correct. But once we cancel wage credits, the employers are only charged based on the wages

that are used to establish the claim. So if we have to

cancel wage credits for that employer, then the employer is not going to be charged.

Now, I think what Norm was suggesting is, if there's a basis year employer who already is getting relief of charges for whatever reason, then we should give those 580 hours we are going to cancel to the other base year employers? No? Am I incorrect?

MR. RAFFAELL: Not necessarily. What I'm saying is, if you have got 580 hours to distribute and you have three employers, my impression was if you are going to use a method where you go back and take a portion from each of them and -- or, you know, you may want to choose to take the last one back. It's your decision. But there will be employers that are going to get relief regardless of what you do because of the work separation issues.

There will be employers that are going to get charged. Now, the end result by removing those wage credits, that

could change the calculation of the weekly benefit amount that person is eligible for. And so those that are getting charged will still get charged, but they will get a reduced amount.

And then there becomes an overpayment that could be in existence as well because of the reduced amount. I assume they probably would get relief of that because they should

not have been charged for it. Those that are getting relief already, it's not going to affect.

MS. MEYERS: Correct. Cancelation of wage credits could result in a lowering of the weekly benefit amount, exactly.

MS. BACIGALUPO: I think a little bit of confusion on the issue is that their weekly benefit charges is the intent of this. And I think really the intent of this part of statute is this is the consequence for a claimant for an act of misconduct or of gross misconduct.

So the relief of benefit charges to the employer is a separate section of the statute, so, of course, the last employer would get that. The removal of the tax credits is the consequence to the employee that will afford him less benefits over his base year and lower credits.

And it appears to me that if they worked less than 680 hours for their last employer, then because of the way the statute is written the prior employers will benefit by having some of their credits removed. And although there doesn't seem to be a particular reason in favor of those employers, the reason is the consequence to the claimant.

MS. MEYERS: Correct. This section is written as what

is the penalty to the claimant. But canceling the base year wage credits, it may have a result of benefitting the employer, but I agree that that wasn't the intent of this

section. The section was to penalize the claimant for committing gross misconduct.

MR. KNOWLES: If the legislature had intended the other employers also to benefit, they would have provided in the Section 21, which we are going to get to coming up on page 30 and 31, a specific provision that would have benefited the experience rating accounts of the other nonseparating employers. But the legislature didn't do that.

And so while this might be what the employer community

thought they were getting out of this, that's not what the statute as written currently says. That is to say, the statute as it's currently written with respect to charging of employers focuses on the last separating employer before the disqualification.

Let's assume a set of circumstances. And I'm just going to postulate this so the department can understand what I'm saying. An employee is discharged for stealing, let's say. And he goes -- there's no criminal prosecution that goes forward against him at all, but he's going to lose. Because it's the kind of conduct that would be flagrant and wanton conduct, he's going to have a cancelation of those wage credits. And it may be that he has only worked for the new employer for 100 hours, and he gets dinged for 680 hours of credits.

But he has been working full time before he engaged in

this stealing exercise. And he goes out and gets another job and works ten weeks and requalifies for benefits and has enough benefits that are -- his weekly benefit amount may be reduced, but the benefits are still charged to the account of the experience-rated employers who are liable. And there's no tax relief available except to the separating employer under the Section 21 formulation that we see.

So the new employer or the old employers or the 580 hours of employers, they are not getting any tax relief from this except to the extent that the individual's weekly benefit amount is reduced.

Now, it's entirely possible under this formulation that an employee could lose 680 hours and still have enough hours

to be getting maximum benefits. And so the prior separating employers, as the statute is written, they don't get any tax relief from that. There's no savings to Employers 1 and 2.

Let's say Employer 3 is the one he stole from. Employers 1 and 2, they still get charged in full, and they get no tax relief from the reduction or the loss of those wage credits. So any belief on the part of the employer community that they are going to get tax relief under this provision -- it may happen in some cases, but it may not happen in others.

Even though the employee has subsequently gone on and had a cancelation of wage credits, been disqualified and

requalified, now they are back getting benefits. The

employer doesn't get any benefit from that situation under the statute as amended.

So don't think you are getting any tax relief here. Because if you wanted that, it I should have been in the statute. Now, that may have been the intent of the employer community when they ramrodded this thing through the legislature. But guess what? We have got no legislative history that says that. And so we have got to interpret the statute as written. And the statute that was written says the employer gets no tax relief.

MS. MEYERS: Thank you. Gina. And then we will need to move on.

MS. BACIGALUPO: Actually, until the last rule making session employers had no idea that others than the last employer would get a distribution of those hours.

I believe what you had explained, Juanita, and correct

me if I'm wrong, was that the department has to apply that wage credit to something. You can't take it from the individual without doing something to an employer. Is that what you explained at the last meeting?

MS. MEYERS: Correct. The statute says we cancel all the wage credits from that employment or 680 hours of wage credits, whichever is greater. So maybe they only worked a day for that separating employer. But we have to cancel 680

hours. Now, if they didn't work 680 hours for the separating employer, we have to cancel them somewhere, so we have to take them out of their claim.

What our question was, so when we take them off the other claim, only the wages that are used for the claim are

what we charged to the employer. So when they cancel those wages -- say there's only one other base year employer. We take 670 hours away from that base year employer because they only worked 10 hours for that separating employer.

So that employer by definition will get some relief because those wages are pulled out. We are not changing their tax rate, but those wages are no longer forming the basis for that claim. They will have a claim, but it will be a lower weekly benefit amount. So the result will be -- in that case there could be some savings to the employer.

MS. BACIGALUPO: And the only reason is because administratively --

MS. MEYERS: The department has to cancel them.

MS. BACIGALUPO: Not because the employer has requested it. That just came up as part of this rule making.

MS. MEYERS: Correct. And Mr. Knowles disagrees.

MR. KNOWLES: Well, I think the department is living in a fool's paradise if you think you can credit the employers back without some statutory authority. It may be an administrative problem for you, I don't know, figuring out

where those hours -- how you cancel the individual --

But I don't think the statute permits you to do what you are saying you are going to do. And if you do it, you are going to have a real problem. Because you will have various employers who may believe they are entitled to relief.

You have got to do what the statute says. You don't have authority in the statute to do what you are saying you want to do. And if you want that authority, you have got to

go to the legislature and ask for it. Because the new Section 21 specifically limits the circumstances under which you can credit employers' accounts, and this is not one of those circumstances.

And so if the department engages in this process, you are making an unlawful gift of public funds to employers, and you violate the state constitution.

MS. MEYERS: Okay. So noted.

All right. Do we want to take a break for lunch here? And what do you need? Is an hour sufficient? Do you need a little longer? I don't know what's in the area.

MS. BACIGALUPO: There's quite a bit. Quite a bit of restaurants nearby.

MS. METCALF: Can I say something? We are not yet where we wanted to be at 10:30 this morning, according to the agenda. There's an awful lot to cover, and we have to

be out of this room by 4:00.

Maybe when we come back we can talk about what it is we want to do and not do, or we can continue as we are and when 4:00 comes we can just pack up and go out the door. So kind of think about it as you're at lunch.

MS. MEYERS: As we have been finding, the tax section is taking less time than we had thought.

So an hour? Back at 1:30. What's the consensus? Okay. We'll meet back at one hour.

(Recess taken for lunch.)

MS. METCALF: We're reconvening for the afternoon. We are going to go through this very quickly. Juanita has two sections of this law that she wants to cover briefly. And

we will also be open to any other questions or comments that you may have.

MS. MEYERS: Okay. I just wanted to go back. I know we are cutting it short because most of you remaining have pretty much been involved in the previous meetings.

Section 11. After the previous meetings, what we have talked about before is that it is our belief that the -- while the unemployment rate can drop to 26 weeks when we get to 6.8 percent, it can still go back up if we go above that.

I know there was disagreement that that wasn't the intent. But our attorney looked at that again, and she didn't feel that that interpretation, the way the statute

was written, would survive a challenge in court. So I'm just letting you folks know so that if you want to seek a legislative remedy you could do so.

MR. RAFFAELL: The question I would have for the attorney is, one, where are they getting that idea from? And, two, the law says that in the month that our current unemployment rate goes to 6.8. It doesn't say any unemployment rate. It says in the month that the unemployment rate goes below 6.8 percent any claim thereafter is changed to 26 weeks. There is no language thereafter that says in succeeding months it can go back up to 30. There's nothing at all that says that. It's very clear.

And I don't know how you could get an interpretation -- and probably we would like to talk to them about that interpretation. I don't understand that. And it just -- there's no authorization whatsoever that says it's going to

go back up.

I can't see how you can come to an interpretation that says that you can raise it. It's very clear and they are putting -- they are interpreting something that's not written.

MS. MEYERS: Okay. I will forward your concerns.

MR. RAFFAELL: Thank you.

MS. BACIGALUPO: Have they put anything in writing of how they came to this decision?

MS. MEYERS: No. That's verbal advice. But even if it was in writing, we generally don't share that. That's our attorney's advice.

MR. RAFFAELL: If you look at precedents in what the court says, there's nothing that authorizes for that to change.

MS. MEYERS: All right. But I did want to let you know.

MS. MEYERS: The next section is Section 21.

MR. RAFFAELL: Can I add one more thing about that?

MS. MEYERS: Certainly.

MR. RAFFAELL: It would be inconsistent with the theory that would support that kind of ruling for the legislature to change, on even a short-term basis, the weeks with which an individual would be eligible to draw total weeks.

And to me, it's similar to what Mr. Knowles said earlier. You have unequal treatment. In other words, today if I filed, somebody tomorrow that has the same base year information as I do, they could be able to get 30 weeks, and I would be only able to get 26 weeks.

In addition, I think it creates a nightmare logistically for the department to keep track of all of these people if it's going back and forth.

And I can't believe that the legislature's intent would

be to change it so that it would go back and forth. It just doesn't make sense. And to me, they just never did authorize it to go back and forth. The theory of them wanting to change it for one or two times doesn't make sense.

MS. MEYERS: Okay.

Now Section 21, which is the section that talks about benefit charging. The last two meetings, particularly the

last one, there was a great deal of discussion about section (2)(c) and what that section meant.

MS. BACIGALUPO: In 21?

MS. MEYERS: Section 21. It's on page 30 of the statute.

And we told them at the last meeting that we had to make a decision because our programmers just had to get started. So after reviewing all of the comments we got at both meetings, what we have come up with is: The person quit for a new job and they actually started work, and then that second employer lays them off. If that second employer is a base year employer, they are the last employer, and they are a taxable employer, they get all the charges. Okay?

If the person quit their job because of one of the deteriorating working conditions -- change of hours, distance, pay, et cetera -- and are allowed, again, the

separating employer is -- the person who caused that deterioration is the one who's charged, again, if they are a base year employer, a taxable employer, and the last employer. All the charges go to that employer from whom the claimant experienced a deterioration in working conditions.

So that's the only firm decision we have made so far in how we are going to go on these just because we had to get started. And I think that's consistent with what everybody expressed was their intent.

I know some people felt that the last employer wouldn't have to be a base year employer, but that's pretty clear in the statute where is says that the individual's separating

employer is a covered contribution paying base year employer.

So it doesn't apply if the person from whom they experienced a deterioration of working conditions was just a lag quarter employer or fifth quarter. In that case, the benefits are going to be charged just as they normally are. And a base year employer could apply for relief of charges if they are eligible.

MS. BACIGALUPO: And you would get relief if your employee quit to go to another job.

MS. MEYERS: Certainly. What would happen is they would be socialized as opposed to them all being moved to another employer.

MS. BACIGALUPO: I get what you are saying. But it seems contradictory to the idea that this was written so that that employer that takes the person is chargeable. And for them to be chargeable, they will have to employ that person for over six months, just pretty much. Because you have got the lag quarter and the quarter they are let go doesn't count. So not until they have gone into their third quarter of employment would that new employer be on the hook. So employers who give a job and then toss it away, it's not going to touch them.

MS. MEYERS: That's correct.

MS. BACIGALUPO: Because of how it's written?

MS. MEYERS: Yes. The original version of this law said their last employer, and it didn't talk about base year. And we did at the time question how we are going to charge an employer who is not part of the base year. We

have no mechanism to do that. So when we got this version again, that was added. Covered contribution paying base year employer was added to this final version.

MS. BACIGALUPO: What is that again?

MS. MEYERS: (2)(c), "When the eligible individual's separating employer is a covered contribution paying base year employer." So if it's not in the base year, the charges will go as they normally do.

And we talked about this at the UI advisory committee.

And I briefed some of the other people who were at the last meeting, like Jan Gee, and so on.

And she agrees with you that the intent was to try to get people who hire people away and then work them for a

couple days and then let them go. But she said she recognized that the way the statute was worded, where it requires that they be a base year employer, that the statute isn't accomplishing what she had thought it was going to do.

MS. BACIGALUPO: Is that open for the same remedy as the other sections we just talked about?

MS. MEYERS: Anything in this bill is open for requesting legislative changes. The entire act is passed by the legislature, and the legislature can go in and change it.

MS. BACIGALUPO: Change and clarify.

MS. MEYERS: Correct, absolutely. The only place the department would step in, again, is if it is a risk to the trust fund or if it's a conformity issue, and then we would raise objections or express concerns. But other than that, we generally don't take a position on the bills.

Okay. Are there any other questions or comments?

At the first meeting -- and Norm you were there. What we promised to do is before we actually draft the text of the rules is to get out kind of an outline or summary of what decisions we have made on some of these issues and

where we will be going with the rules before we actually come up with the language and get that out to you.

Susan has started some of the drafting, and we will have to go back and incorporate, as needed, any comments that we have received today. And hopefully we will get that out in about a week or so. We will e-mail it to everybody who has been to these meetings and everybody who has asked to be notified about these meetings.

And you can comment on that, and from that we will actually start drafting the rules. And the next time we come out we will have draft rules to take a look at.

And probably what I will do, just since these meetings are so long and I anticipate that those will be longer when we actually get into the text of the rules, is have separate meetings for the benefit rules and then for the tax rules. So the employers or business or whoever wants to come to whichever one. There's going to be some people who are going to be interested in both.

MS. BACIGALUPO: Labor is probably more interested in benefits.

MS. MEYERS: Labor is probably more interested in benefits.

MR. RAFFAELL: And I think it's probably good for you to break them up too.

25 MS. MEYERS: Because most of the tax provisions don't

1 actually go into effect until 2005, we have a little more
2 time with those rules. There's a couple of pieces that go
3 in early, like, the penalty and the voluntary contribution
4 portion part of that goes into effect now. But some of it
5 doesn't happen until later, so I think on some of the tax
6 rules we have a little more time.
7 But the benefit rules we are in a mad dash just to try
8 to get something written and out there in time to have
9 public comment and also in time to have our staff trained.
10 MS. BACIGALUPO: Which all has to happen before January
11 4th.
12 MS. MEYERS: Yes. They are starting to train in mid

November.

MS. BACIGALUPO: I see some long work weeks.

MS. MEYERS: We are hoping within a week we will get you out the outline. That's why I took more notes here than I normally do, just because it will take us a little while to get the transcript, and we need to start working on the rules at least the outlines of where we are going to go. Some of the decisions, of course, are going to be made at levels higher than those of us in this room. Annette Copeland, who is our assist commissioner, will probably make the call on some of these areas. We will provide her options based on the recommendations from the group meetings we have had, and then she will make a decision, she and

ultimately the commissioner.

And, again, they are not final. When we say they are draft rules, they are exactly that. But it will give us an idea of where we are going. We may fine-tune the language and so on. But it will give you an idea of where we are going so that we can start implementing the program and getting our staff trained, because we simply have to give some guidance to our staff.

Well, you see how many interpretations there are of the law as it is now. And I don't think you want every one of 200 to 300 adjudicators out there deciding on their own what a section of the law means. How many people did we have at the last meeting? Twenty-five people were in the room at the last meeting, and we in some cases had 15 to 20 opinions on what a section of the law meant, so we want to have guidelines.

MS. METCALF: So once she gets to the point where they have the proposed draft, then we are going to start writing -- the training folks are going to start training and start to get the benefit policy guide and manuals up-to-date, recognizing if we wait until everything is in place to start this process, we will have a week if we are lucky. So we will have to get going. And we will backtrack if we need to along the way.

MS. MEYERS: It's easier to fix a few things than to try to implement it all at the last minute.

And quite frankly, our programmers need answers to some of these cases because they have to program everything, and

we have to draft the text. You are probably aware that most of our decisions that come out are automated to a degree, and then we fill in some of the paragraphs. But we have to prepare the automated portions in time for them to be programmed so decisions can be generated after January 4.

MS. METCALF: And because we have been through this legislation, we are required to do a study on the impact of the voluntary quit. We have to design all new voluntarily quit codes so that we can pull all of the information out of the system instead of having to do things manually.

So all the programming and training reasons -- we have to have a denial code for every reason, so there's a little more complexity than we have in our current system. But it will give us more information than we have.

MS. BACIGALUPO: I just -- we had a little discussion off the record at the last meeting, and I don't know if you guys addressed it before I got here.

But I wanted to make sure it's on the record that in the training there should be something addressed to the adjudicators of the shift away from liberally construing in favor of the claimant. Although that doesn't change -- it may not change the decision. It definitely doesn't change

the facts, but it changes the way in which they will look at the facts and the way they balance the facts. And I think that needs to be addressed to make sure that everybody realizes that has changed.

MS. MEYERS: We will certainly tell them that the language was stricken and what they need to use is apply the law and look at the preponderance of the evidence. And

wherever that balance falls, that's how your decision goes based on the weight of the evidence.

MS. BACIGALUPO: Because I think before if it was extremely close it was, "We won't go any further." It was liberally construed for the claimant, which it was written that way.

MS. MEYERS: Right.

MS. BACIGALUPO: Now, if it's extremely close, we are told to take a different step.

MS. MEYERS: We will attempt to get more information so that we can come out with a preponderance of the evidence. However, if all the evidence even after our best efforts weighs equally, we will probably still pay the claimant.

Because the entire act is written to provide relief for unemployed workers. And so if there is a case where with our best efforts we can't find more information and the facts really do weigh equally, we'll probably pay and let

the employer appeal if they disagree.

But you are correct. We do our best to get information. And we will continue to do so and let the chips fall based on the information we obtain from the employer.

MS. METCALF: And since we have a minute, aside and apart from the legislation that's going on, we have built an expert fact-finding system that we are quite proud of. It takes them down a decision trail and shows them the choices. And once we get it all going -- it's still pretty green -- we feel really confident that as the adjudicators use those decision paths that they will have all the information they

need at the end to make the correct decision.

MS. MEYERS: We still always have to make some credibility determinations, but we back that up. The claimant says one thing. The employer says another thing. We ask them for documentation or ask additional questions to try to come up with a determination as to who is the more credible person. And that's not going to change. That's just a part of adjudication.

MS. BACIGALUPO: Some adjudicators automatically give that to the claimant. I have a situation currently that I have the official termination slip that they gave the union. It specifically says "failure of drug test." The claimant faxed in a copy that doesn't say that.

I'm told, "You can't prove to me you had it there."

MS. MEYERS: Okay.

MS. BACIGALUPO: Somebody should take a little careful consideration of that.

MS. MEYERS: Okay. Anything else? Any other comments, questions, concerns about the legislation?

MR. RAFFAELL: 30 versus 26 again. In the medical arena, sometimes if we are not sure we always ask for a second opinion. I don't know if procedurally you can do that. I don't know if it's one AG that's looking at this or a number of AGs that are coming up with this combined ruling, but I find it hard to believe that they would authorize going back to 30 weeks when there's nothing in the law that says that.

And I would recommend another option would be to run it by the appeal section and have some of the administrative

law judges give you a consensus. Because I can't believe that somebody that's an attorney is coming up with putting words in there that are just not there. That document deletes -- once we hit 6.8 or less it deletes the benefits from 30 to 26 weeks. And, again, at that point there is no instruction whatsoever that says in subsequent weeks if it would go back up above 6.8 that it would go back to 30.

And I can't see how you would interpret words that don't exist in that section. I just can't believe that that's the case. And I'm comfortable that that was the

intent of the legislature to make us competitive and not just do it on a month-by-month basis.

And the theory of -- the whole thing is it's going to

create a nightmare for you. You are going to have to notify claimants, "Yours is 30, 26, 30."

And then you are going to probably have to let those know that are back up to 30 that this is being litigated, and you may have an overpayment somewhere a long the line, because that will surely be challenged.

I don't understand -- you might ask them the philosophy of where they are getting this from.

MS. MEYERS: Okay. I will express your strong concerns.

MS. METCALF: And just so you know, she really does that. She meets with Annette and talks to her about what was said and what opinions were really strong. And she brought that forward before and will do it again.

MR. RAFFAELL: And we have had occasions where the AG's office met with us and then they changed their opinion, and

they just didn't see all of what we were arguing. And so I know you do pursue those, and you do a very good job of it. And I thank you for that.

MS. MEYERS: Okay. Anything further for the good of the order? Thank you for attending, and we will see you again probably sometime in October -- late October, early November, possibly, to look at a draft.

MS. METCALF: Thank you. Thank you all for your patience and your professionalism. We really appreciate it.

(Whereupon, at 2:20 p.m., the proceedings concluded.)

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